Washington University Journal of Law & Policy

Volume 12 *Access to Justice: The Social Responsibility of Lawyers*

January 2003

Homeland Defense: Another Nail in the Coffin for Posse Comitatus

Nathan Canestaro
Central Intelligence Agency

Follow this and additional works at: https://openscholarship.wustl.edu/law_journal_law_policy

Part of the Law Commons

Recommended Citation

Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASH. U. J. L. & POL'Y 99 (2003),
https://openscholarship.wustl.edu/law_journal_law_policy/vol12/iss1/7

This Article is brought to you for free and open access by Washington University Open Scholarship. It has been accepted for inclusion in Washington University Journal of Law & Policy by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

Homeland Defense: Another Nail in the Coffin for *Posse Comitatus*

Nathan Canestaro*

I. INTRODUCTION

> Whoever, except in cases under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined [under this title] or imprisoned not more than two years, or both.[1]

Since its enactment in 1878, the Posse Comitatus Act ("PCA") has upheld a basic value of American democracy—the principle that the military cannot enforce civilian law. This principle, derived from a long tradition of antimilitarism in English common law, represents the "traditional and strong resistance of Americans to any military intrusion into civilian affairs."[2] Despite its status as a "fundamental tenet of our system of law,"[3] the PCA has lain in obscurity for much of its existence. Derided by one court as an "obscure and all-but-forgotten statute,"[4] and "backwash of the Reconstruction period,"[5] its criminal sanctions have never been enforced during its 120-year history. In the limited number of cases where the PCA has undergone judicial review, it has often appeared in defense attorneys' creative—

---

* Counterterrorist Center, Central Intelligence Agency (CIA), 2002. Previously assigned to CIA's Afghanistan Task Force and DCI Interagency Balkan Task Force. J.D., University of Tennessee, 2001.

This material has been reviewed by CIA. That review neither constitutes CIA authentication of information nor implies its endorsement of the author's views.

1. 18 U.S.C. § 1385 (1982).
2. Laird v. Tatum, 408 U.S. 1, 15 (1972).
3. People v. Burden, 288 N.W.2d 392, 397 (Mich. Ct. App. 1979).
4. Chandler v. United States, 171 F.2d 921, 936 (1st Cir. 1948).
5. *Id.*

Washington University Open Scholarship

and almost entirely unsuccessful—motions to contest the prosecution's jurisdiction, to suppress evidence, or to invalidate government action.

The effectiveness of the PCA has declined over the course of the last thirty years. Legislative pressure, a lack of judicial enforcement, and numerous exceptions have taken their toll on the PCA's strength. An increased public confidence in the military and judicial deference to military actions have undermined the principles upon which the PCA was founded. Accordingly, this has increased the Department of Defense's ("DoD") legal freedom to domestically intervene. In the wake of the September 11, 2001, terrorist attacks, the military's place in homeland security has become a major national issue. Even before the attacks, the DoD played a major supporting role in counter-drug efforts and in formulating a response to potential chemical or biological terrorist attacks. Since the attacks, the military has dramatically widened the scope of its domestic activities. For the first time, combat aircraft patrolled the skies over major American cities while uniformed troops stood guard in the nation's airports. The troops and jets have now been withdrawn. Yet the creation of a new military command for the sole purpose of homeland defense indicates the intention of the armed forces to remain engaged in that role.

With the groundswell of public support for the war against terrorism, the decay of posse comitatus has accelerated dramatically. Some politicians and media sources now suggest that Congress amend or even repeal the PCA to allow a degree of domestic military involvement that would have been unthinkable five years ago.[6] Although there is undoubtedly a certain pragmatism in levying the immense resources of the U.S. military against the threat of domestic terrorism, this strategy ignores the consequences of using soldiers as a substitute for civilian law enforcement. The military is not a police force; it is trained to engage and destroy the enemy, not to protect constitutional rights. The founding fathers feared the involvement of the Army in the nation's affairs for good reason. History has demonstrated that employing soldiers to enforce the law is inherently dangerous to the rights of the people.

---

6. *See War Prompts Debate on Military Law: Posse Comitatus Act of 1878 Bans Use of Troops for Many Actions on U.S. Soil*, HOUSTON CHRONICLE, Nov. 11, 2001, at 39.

This Article will prove that the "War on Terrorism" will undermine the PCA. The "War on Drugs" has already eroded the PCA, but the "War on Terrorism" could be fatal to it. First, this Article will examine the roots of the principle of posse comitatus in English Common Law, and in the context of Colonial America and the post-Reconstruction period. This Article will establish that a separation of the civil and military spheres, specifically by prohibiting the military's enforcement of civil law, is a fundamental value upon which the United States was founded. It will show how this prohibition has been slowly eroding since early in this nation's history. Focusing on the civil abuses of posse comitatus during the Reconstruction period will demonstrate the consequences of unchecked domestic military power.

Next, this Article will turn to the 1981 and 1988 Drug War amendments to the PCA to show that Congress has demonstrated its intent to levy the military's resources against society's problems, even over the DoD's objections to extend their duties beyond their role as the nation's "warfighter." This Article will then examine each of the exceptions to the PCA to prove that substantial exceptions have seriously weakened it. Building on narrow judicial interpretations of the PCA, Congress has responded to modern national security threats such as drugs, terrorism, and weapons of mass destruction by giving the military a substantial support role. Beginning with the Wounded Knee standoff of 1973, the amount of military assistance that the PCA permits has risen dramatically. Meanwhile, the courts have been extremely reluctant to enforce violations to expand its scope beyond criminal sanctions. Finally, this Article will analyze the military's growing role in homeland defense, and explore the consequences of the decline of posse comitatus.

II. HISTORICAL ORIGINS OF POSSE COMITATUS

A. English Common Law

> A Standing Army, however necessary it may be at some times, is always dangerous to the Liberties of the People. Soldiers are apt to consider themselves as a Body distinct from the rest of the Citizens. They have their Arms always in their hands . . .

Washington University Open Scholarship

> They soon become attached to their officers and disposed to yield implicit obedience to their Commands. Such a power should be watched with a jealous Eye.[7]

The term posse comitatus translates to "power of the county,"[8] derived from the Roman practice of allowing an entourage of citizens to escort proconsuls as they traveled to their places of duty.[9] In the Anglo-American legal tradition, this principle stretches back to the Thirteenth-Century English antimilitary sentiment.[10] At that time, sheriffs and magistrates upheld the civil peace with the assistance of the *jurata ad arma*, a pool of free men on whom they relied upon for help.[11]

Founded in the Twelfth Century under the Assize of Arms, the *jurata ad arma* composed of every able-bodied male over the age of fifteen,[12] and served primarily as a civilian military reserve until the Fourteenth Century.[13] The transition of its role from military to law enforcement came as a response to the increasing reliance of English monarchs to enforce the law by force under a declaration of martial law. Under such a declaration, the King would assert his authority on the grounds of necessity, and suspend civil authority while employing the military to maintain order.[14]

---

7. Letter from Samuel Adams to Joseph Warren (Jan. 7, 1776) (on file with the Massachusetts Historical Society, Collections, LXII-LXXIII, Boston, MA), *reprinted in* RICHARD H. KOHN, THE EAGLE AND SWORD: THE BEGINNINGS OF THE MILITARY ESTABLISHMENT IN AMERICA 2 (1975).

8. BLACK'S LAW DICTIONARY 1183 (7th ed. 1999).

9. Major H.W.C. Furman, *Restrictions Upon Use of the Army Imposed By the Posse Comitatus Act*, 7 MIL. L. REV. 85, 87 (1960).

10. WILLIAM O. DOUGLAS, THE RIGHT OF THE PEOPLE 112 (1972).

11. David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders,* 57 IOWA L. REV. 1, 4 (1971) [hereinafter Engdahl, *Soldiers*].

12. "For purposes of keeping the domestic peace, [the members of the *jurata ad arma*] were aides to the sheriff subject to the King's ordinary courts, and governed by the rules of developing common law. In this . . . capacity the *jurata ad arma* came to be known in the next several centuries as the *posse comitatus*." *Id.* at 5. *See also* BLACK'S LAW DICTIONARY 1162 (6th Ed. 1990).

13. Engdahl, *Soldiers*, *supra* note 11, at 5.

14. David E. Engdahl, *Foundations for Military Intervention in the United States*, 7 U. PUGET SOUND L. REV. 1 (1983), *reprinted in* MILITARY INTERVENTION IN DEMOCRATIC SOCIETIES 6 (Peter J. Rowe & Christopher J. Whelan eds., 1985) [hereinafter Engdahl, *Military Intervention*].

Under Kings James I and Charles I, troops were quartered in private homes, courts staged summary trials, and brutal military force suppressed civil unrest.[15] In 1628, Parliament's Petition of Right protested the use of military tribunals to try civilians by the Tudor and Stuart monarchs, arguing it was improper under the Magna Carta's provision that no man would be taken, imprisoned, or killed except "by the law of the land."[16] The Crown's continued use of martial law, however, sparked the English Civil War in 1642. The military tyranny of the Cromwell regime further ingrained upon the English public the dangers of a standing army.[17]

By the Restoration, the public feared the military so much that "no standing army . . . became the watchword of all parties."[18] In response, Parliament drafted the Bill of Rights in 1689, declaring "that the raising or keeping [of] a standing army within the Kingdome in time[s] of peace, unless it be with the consent of Parliament, is against law."[19] This Bill echoed the terms of the Magna Carta and Petition of Right, stating that the use of the military to enforce order is not due process of law.[20] It also struck new ground by placing the army under the strict control of the legislature.[21]

The Riot Act's passage in 1714 further bolstered these safeguards against military intervention. The Riot Act required the sheriff to order a crowd to disperse before employing force against it.[22] Only after this requirement was satisfied could the sheriff call the posse comitatus, consisting of "all his Majesty's subjects of age and ability," to restore the peace.[23] In contrast, the Riot Act strictly forbade employing the army in this same role, as the military force was solely reserved for suppressing open rebellion.[24]

---

15. *Id. See also* Ex Parte Milligan, 71 U.S. 2, 92 (1866); Duncan v. Kahanamoku, 327 U.S. 304, 320 (1946).
16. DOUGLAS, *supra* note 10, at 111.
17. *Id.* at 113.
18. *Id.* at 113.
19. *Id.* at 112.
20. Engdahl, *Military Intervention*, *supra* note 14, at 6.
21. John D. Gates, *Don't Call Out the Marines: An Assessment of the Posse Comitatus Act*, 13 TEX. TECH L. REV. 1467, 1470 (1982).
22. Engdahl, *Soldiers*, *supra* note 11, at 16-17.
23. *Id.* at 17 (quoting 1 Geo. 1, Stat. 2.C.5 (1714)).
24. Engdahl, *Military Intervention*, *supra* note 14, at 7.

Washington University Open Scholarship

Although English common law much honored the principle of posse comitatus, the circumstances surrounding the Gordon Riots of June 2, 1780 marked the beginning of its erosion. At that time, a crowd of as many as 100,000 Protestant extremists had marched into London,[25] overwhelming the city's posse comitatus. Rioters burned houses throughout the city, thus forcing Parliament to adjourn.[26] Emboldened by their success in disrupting the government, the crowd stormed the city's courts and prisons. They also set fire to the home of the great jurist, Lord Mansfield. The mob was finally dispelled by the army's volley of musket fire, which was called upon by the King.[27] With order restored, Parliament reconvened and debated the propriety of using military force to uphold the law. Lord Mansfield defended the crown's actions by reminding the assembly of the posse comitatus. He stated, "I presume it is known to his Majesty's confidential servants, that every individual, in his private capacity, may lawfully interfere to suppress a riot, much more to prevent acts of felony, treason, and rebellion."[28] He then continued by suggesting that the army's actions in dispelling the mobs were the actions of a proper posse comitatus.[29] He drew parallels to the *jurata ad arma*, where citizens played a role in both the military and in law enforcement.[30]

> What any single individual may lawfully do for the prevention of crime and preservation of the public peace, may be done by any number assembled to perform their duty as good citizens . . . The military have been called in . . . not as *soldiers*, but as *citizens*. No matter whether their coats be red or brown, they were employed, not to subvert, but to preserve, the laws and constitution which we all prize so highly.[31]

---

25. 7 CONG. REC. 3582 (1878).
26. Engdahl, *Soldiers*, *supra* note 11, at 31.
27. *Id.* at 32.
28. *Id.* at 33 (quoting THE PARLIAMENTARY HISTORY OF ENGLAND 688-98 (W. Cobbett ed. 1814)).
29. *Id.*
30. *Id.*
31. Engdahl, *Soldiers*, *supra* note 11, at 33-34 (quoting THE PARLIAMENTARY HISTORY OF ENGLAND 688-98 (W. Cobbett, ed. 1914)).

Under the "Mansfield Doctrine," uniformed soldiers serving in a posse perform their duty as citizen civilians to enforce the law, even though the military's official use in the same situation would be impermissible.[32]

As Britain expanded to the American colonies, its citizens brought with them their mistrust of the military, which they viewed as instruments of oppression and tyranny. According to Richard Kohn, "no principle of government was more widely understood or more completely accepted [by the founders] . . . than the danger of a standing army in peacetime."[33] The colonists, as British subjects, viewed themselves as inheritors of the same civil protections against military rule that citizens in England had gained following the Restoration, such as the Petition of Right.[34] However, colonists initially had little exposure to military power. Only a limited number of British troops were present on the continent prior to 1763. In the absence of Indian threat, the colonists provided for their own collective defense by adopting the old English militia system.[35] Much like those citizens serving in the *jurata ad arma*, every "able bodied male" in the Colonial militia was responsible for arming himself and participating in a local unit to serve in both a law enforcement and military reserve role.[36] Colonists regarded the militia as fundamentally different from regular military forces, and thus was not subject to the same public suspicion or scrutiny.[37]

As differences between the colonists and England grew, however, British military forces had to take on a much wider role. By 1763, London was working to tighten its control of the Colonies, and proposed moving as many as 10,000 troops to the Americas.[38] This was the first time that the British government had stationed such a large number of redcoats in the Americas. Soon, British troops, rather

32. *Id.* at 35.

33. KOHN, *supra* note 7, at 2.

34. Engdahl, *Military Intervention*, *supra* note 14, at 3. *See also* Ex Parte Milligan, 71 U.S. 2, 111 (1866).

35. KOHN, *supra* note 7, at 7.

36. *Id.*

37. *See Id.* at 7-9.

38. OFFICE OF THE CHIEF OF MILITARY HISTORY, AMERICAN MILITARY HISTORY, UNITED STATES ARMY 41 (Maurice Matloff ed., 1973) [hereinafter AMERICAN MILITARY HISTORY].

Washington University Open Scholarship

than civil magistrates and the posse comitatus, were enforcing the law on a regular basis. Colonial antimilitary sentiment quickly began to mount in response.[39]

According to one scholar, the "single most inflammatory" action to the colonists' sensibilities was the British military's actions that violated established principles of English law.[40] Such actions included the involuntary quartering of troops and the enforcement of civil law by military force, both of which the Petition of Right[41] and the Bill of Rights[42] decried as illegal. The enactment of the Quartering Act of 1765 forcibly placed redcoats in private homes. This was an especially bitter insult to the colonists, as it was reminiscent of the tactics used by the Stuart and Tudor monarchs.[43] Samuel Adams was one of many colonists who protested these violations of established law:

> [L]et us then assert & maintain the honor—the dignity of free citizens and place the military . . . where they always ought & always will be plac'd in every free country, *at the foot of the common law of the land.* . . . to submit to the civil magistrate in the *legal* exercise of power is forever the part of a good subject . . . But, to be called to account by a common soldier, or any soldier, is a badge of slavery that none but a *slave* shall wear.[44]

Nowhere was the increased military involvement in civil affairs more opposed than in Boston. Not only was the city a "hotbed of colonial discontent," but the Massachusetts Bay Charter specifically forbade forced quartering of British troops in Bostonians' private homes.[45] The situation came to an ugly climax in March of 1770, when a formation of British soldiers opened fire upon a crowd of angry Bostonians who pelted them with rocks and snowballs. The attack killed five colonists, and wounded several others.[46] The use of

---

39. Engdahl, *Military Intervention*, *supra* note 14, at 3-4.
40. *Id.* at 3.
41. Engdahl, *Soldiers*, *supra* note 11, at 43 (citing 1 ANNALS OF CONG. 733-47 (1789).
42. Engdahl, *Military Intervention*, *supra* note 14, at 6.
43. *Id.* at 7.
44. Samuel Adams, Address in Protest of the British Army in Boston (1768), *reprinted in* DOUGLAS, *supra* note 10, at 113-14 (emphasis in original).
45. Engdahl, *Soldiers*, *supra* note 11, at 24.
46. *Id.*

professional soldiers instead militia, without a civil proclamation ordering for British citizens to disperse, was in clear violation of the Riot Act of 1714.[47] Building up to the onset of hostilities in 1775, this incident grew into a rallying cry for opposition against the Crown. Parliament attempted to control this mounting resistance by enacting the Administration of Justice Act in 1774.[48] The Act acknowledged that the civil authorities and the posse comitatus were the proper means to disperse a mob, but also allowed for an unrestrained military force to restore order.[49]

The colonists' outrage over the "Boston Massacre" persisted for more than six years, until the Declaration of Independence in 1776. The Declaration decried the King's use of military forces to: "compleat the works of death"[50] against civilians; maintain "in times of peace, Standing Armies without the Consent of our legislature;"[51] "render the military independent of and superior to the Civil Powers;"[52] and "quarter[] large bodies of armed troops among us."[53] These abuses, the colonists concluded, were "totally unworthy . . . of a civilized nation."[54] One historian noted that [t]his repudiation of military intervention in domestic law enforcement," which the founders viewed as an offense against civil liberties, became "the bedrock of due process on which the American government was built."[55]

With the end of the Revolutionary War, and a brief but unsuccessful dalliance with the Articles of Confederation, Americans took up the issue of the role of the military at the Constitutional Convention in 1789. According to historians such as David Engdahl, the most contentious issue at this assembly was whether there should be a national standing army.[56] As the Supreme Court stated in *Perpich v. Department of Defense*, the delegates' "widespread fear

47. *Id.* at 25.
48. Gates, *supra* note 21, at 1471.
49. *Id.*
50. THE DECLARATION OF INDEPENDENCE para. 27 (U.S. 1776).
51. *Id.* at para. 13.
52. *Id.* at para. 14.
53. *Id.* at para. 16.
54. *Id.* at para. 27.
55. Engdahl, *Military Intervention*, *supra* note 14, at 7.
56. *Id.* at 4.

Washington University Open Scholarship

that a national standing army posed an intolerable threat to individual liberty and the sovereignty of the separate States"[57] deeply affected the Constitution's drafting. The delegates were so deeply suspicious that seven of the thirteen colonies—Pennsylvania, North Carolina, Virginia, Delaware, Maryland, New Hampshire and Vermont—stated in their own constitutions that standing armies "are dangerous to liberty."[58] Most of the colonies also prohibited army officers from holding civilian public office.[59] Maryland even excluded militia officers from these positions.[60]

Although many delegates to the convention had concerns about a standing army, nearly every delegate recognized the need to provide for the effective defense of the nation.[61] Because the nation strongly relied upon militia forces during the Revolutionary War, most delegates believed that public opposition to standing armies, the existence of militia, and America's geographic separation from Europe made a standing army unnecessary.[62] To others, the inability of state militia forces to quickly put down Shay's Rebellion demonstrated that they were not adequately armed to uphold the common defense.[63] General Charles Pinckney of South Carolina supported this latter argument, arguing to the South Carolina ratifying convention that "the dignity of a government could [not] be maintained, its safety insured, or its laws administered, without a body of regular forces to aid the magistrate in the execution of his duty."[64] Despite serious reservations, Federalists such as Alexander Hamilton also lobbied for the creation of a national army to respond to threats. "Few persons," stated Hamilton, "will be so visionary as seriously to contend that military forces ought not to be raised to quell a rebellion or resist an invasion."[65]

After much debate, the Convention accepted the necessity of a

57. Perpich v. Dep't of Def., 496 U.S. 334, 340 (1990). *See generally* 7 CONG. REC. 3579 (1878).
58. 7 CONG. REC. 3579 (1878).
59. Engdahl, *Soldiers*, *supra* note 11, at 29.
60. *Id.*
61. KOHN, *supra* note 7, at 75.
62. *Id.* at 80.
63. *Id.* at 78.
64. *Id.* at 76.
65. Engdahl, *Soldiers*, *supra* note 11, at 41.

federal military on the condition that there be safeguards established to keep the military under civilian control. The delegates from New York, Virginia, North Carolina, and Rhode Island wanted an explicit clause in the Constitution establishing the military's subordinate to civil authorities,[66] while North Carolina and Virginia demanded a limit on how long soldiers could serve in peacetime.[67] Representatives from New Hampshire, Virginia, New York, North Carolina, and Rhode Island clamored for constitutional protection against the quartering of soldiers. They also sought to require legislative approval for maintaining a standing army.[68]

As with much in the Constitution, the final agreement was a "bundle of compromises."[69] It divided military control between the federal government and the states, giving the majority to the central government, but guarding against abuse by dividing that allotment between the executive and legislative branches. It allowed for a standing army and navy, but restricted military appropriations to two years, and additionally appointed a civilian commander-in-chief.[70]

The founders' "jealousy of the executive power"[71] was most evident in their delegation of financial control—their most potent safeguard—to the legislature, rather than to the President. Although the Constitution's final form did not include an explicit provision regarding the domestic use of military forces, the Bill of Rights incorporated many aspects of the delegates' original proposals. In particular, Hamilton chose the Fifth Amendment's due process clause to satisfy the delegates who demanded a clear separation between civil and military authority.[72] The Amendment's emphasis on the full and unhindered process of the law implies the superiority of the civil sphere over the exercise of military authority.

As one scholar has observed, however, despite the Bill of Rights, "[d]uring the first ninety years of the republic, there was no clear

66. *Id.* at 42.
67. *Id.* at 41.
68. *Id.* at 41.
69. Paul Schott Stevens, U.S. ARMED FORCES AND HOMELAND DEFENSE: THE LEGAL FRAMEWORK 4 n.3 (Center for Strategic and International Studies Report, 2001).
70. *See* U.S. CONST. art. I, § 8, cl. 1, 12 & 13.
71. Ex parte Milligan, 71 U.S. 2, 54 (1866).
72. Engdahl, *Military Intervention*, *supra* note 14, at 5.

Washington University Open Scholarship

constitutional or legal barrier to the use of federal troops to enforce the laws."[73] Part of this stemmed from the belief—as the Mansfield Doctrine suggests—that the posse comitatus is not only composed by the able-bodied populace, but also by the military.[74] The Judiciary Act of 1789 supported this theory, allowing a federal marshal to "command all necessary assistance in the execution of his duty."[75] Three years later, the law was amended in the Militia Act to allow the marshals to mobilize state militia to help enforce the law.[76] The Act provided that the President could call forth the militia when "the laws of the United States shall be opposed or the execution thereof obstructed, in any state by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the power invested in the marshals."[77] Like Lord Mansfield, the Act justified the involvement of troops under the pretense that they were acting as private citizens, not as soldiers. However, the Act's distinction that the marshals could call only the militia, and not the regular military forces, became quickly lost in general practice.[78]

B. The Civil War and Enactment of the PCA

Despite the strong initial suspicion regarding domestic military involvement, a tradition of using the Army to subdue lawless areas quickly began to grow. Over the next eighty years, the federal marshals' use of the Army as a means of legal enforcement became commonplace. This made the military an accepted part of the posse comitatus. The U.S. government first used military in this role to put down the 1792 Whiskey Rebellion in Pennsylvania.[79] By 1807, Congress felt confident enough in the Army—then small and

73. Edward F. Sherman, *Contemporary Challenges to Traditional Limits on the Role of the Military in American Society*, *in* MILITARY INTERVENTION IN DEMOCRATIC SOCIETIES 216, 219 (Peter J. Rowe & Christopher J. Whelan eds., 1985).

74. Gates, *supra* note 21, at 1469.

75. Judiciary Act of 1789, Ch. 20, 1 Stat. 73, at § 27 (1789).

76. Militia Act of 1792., ch. 28, 1 Stat. 264 at § 2 (1792).

77. *Id.*

78. Maj. Clarence I. Meeks III, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act,* 70 MIL. L. REV. 83, 88 (1975).

79. Mackubin Thomas Owens, *Soldiers Aren't Cops*, NATIONAL REVIEW ONLINE (August 1, 2002), *at* http://www.nationalreview.com/owens/owens080102.asp (last visited Feb. 17, 2003).

dispersed along the frontier—to declare them to be an enforcer of federal law.[80]

The first nationwide use of military force to enforce the law, however, happened over forty years later, under the Fugitive Slave Act of 1850. This law authorized federal marshals to call on the posse comitatus—composed of federal soldiers—to return a slave to his owner.[81] In 1854, Attorney General Caleb Cushing issued an opinion defending the inclusion of whole military units in the posse comitatus, specifically citing the Mansfield doctrine. "The fact that they are organized as military bodies, under the immediate command of their own officers, does not in any wise affect their legal character. They are still the posse comitatus."[82] Six years later his successor, Jeremiah Black, hedged only slightly on this authority. Opining that uniformed soldiers could participate in a posse comitatus by acting in their capacity as citizens, Black conceded that "the military power must be kept in strict subordination to the civil authority, since it is only in the aid of the latter that the former can act at all."[83]

The Civil War and Reconstruction periods marked the apex of military law enforcement. During the war, Union troops in the North regularly overrode civilian officials to act against secessionists, detaining civilians suspected of being Confederate sympathizers. In the South, the Army directly supported the Reconstruction governments in the former Confederate states from 1866 to 1877.[84] When ten former Confederate states refused to ratify the Fourteenth Amendment in 1867, Congress passed the first Reconstruction Act,[85] establishing military rule in the South. The Act divided the region into five military districts, with each district commanded by a general who was authorized to use his forces to protect life and property.[86] President Grant interpreted the Act's terms to authorize the Army to enforce "entire control over the civil governments."[87] The Army's

80. *Id.*
81. Sherman, *supra* note 73, at 219.
82. 6 Op. Att'y. Gen. 466, 473 (1854).
83. 9 Op. Att'y. Gen. 516, 522-23 (1860).
84. Engdahl, *Military Intervention*, *supra* note 14, at 16-17.
85. *Id.* at 16.
86. ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION: 1863-1877, 122 (1990).
87. ALLAN R. MILLET & PETER MASLOWSKI, FOR THE COMMON DEFENSE: A MILITARY

Washington University Open Scholarship

enforcement powers included the removal and replacement of any resisting officials, as well as supervising voter registration and elections, managing court proceedings, and approving state constitutions.[88] The military's involvement was sweeping and commonplace.[89] When marshals needed to forcibly enforce or restore the law, they inevitably called upon Union soldiers rather than members of the general population to serve as a posse.[90] By 1878, the Army had performed its enforcement duties on hundreds of occasions,[91] including tax collection, labor conflict suppression, and the interdiction of illicit liquor production.[92] The 1871 Ku Klux Klan Act made the military's enforcement of the law even more powerful. The Act gave federal troops nearly unrestrained power to intervene and restore order. Additionally, it granted the President with the requisite authority to uphold the law militarily without resorting to civil process. President Grant quickly employed this authority to declare a "condition of lawlessness" in much of South Carolina.[93] He suspended *habeas corpus* in nine counties,[94] and sent federal troops to make hundreds of arrests.[95]

Military rule forcibly installed northern "carpetbaggers" and "scalawags" into southern political institutions. Military rule also removed thousands of local officials and six state governors from office, purged state legislatures, and used military dictum to modify state law.[96] On at least three occasions, federal troops occupied the Louisiana state legislature and harassed its legislators.[97] The "spectacle" of federal troops "marching into the hall and expelling members at the point of the bayonet," incited outrage in both the North and the South alike, thus generating intense controversy in the

---

HISTORY OF THE UNITED STATES OF AMERICA 259 (1994) [hereinafter COMMON DEFENSE].

88. *Id.* at 259.

89. James P. O'Shaughnessy, *The Posse Comitatus Act: Reconstruction Politics Reconsidered,* 13 AM. CRIM. L. REV. 703, 706 (1976).

90. *Id.* at 711.

91. AMERICAN MILITARY HISTORY, *supra* note 38, at 285. *See also* 7 CONG. REC. 3581 (1878).

92. SHERMAN, *supra* note 73, at 219 n.6-7. *See also* 7 CONG. REC. 3581, 4243 (1878).

93. COMMON DEFENSE, *supra* note 87, at 261.

94. *Id.*

95. FONER, *supra* note 86, at 196-197.

96. Engdahl, *Military Intervention*, *supra* note 14, at 17.

97. O'Shaughnessy, *supra* note 89, at 706. *See also* 7 CONG. REC. 3850 (1878).

Democrat-controlled Congress.[98] Even President Grant acknowledged that of the Reconstruction measures, "much of it, no doubt[,] was unconstitutional."[99] Yet he expressed his hope that the new reconstruction measures would "serve their purpose before the question of constitutionality could be submitted to the judiciary and a decision obtained."[100]

The situation came to a head over the results of the disputed 1876 Presidential election. Republican Rutherford B. Hayes won the Presidency over his opponent, Democrat Samuel J. Tilden, by only the disputed electoral votes of three states, South Carolina, Louisiana, and Florida.[101] Coincidentally, these were the same states where thousands of "special deputy marshals"—federal troops—had been called out to guard the polls and to "prevent fraud."[102] President Grant claimed that these soldiers did nothing more than "preserve peace and prevent intimidation of the voters."[103] On the same day that the election was awarded to Hayes, southern Democrats introduced a rider on an Army appropriations bill, providing that increased military funds could not be used in "support . . . of any state government or office thereof."[104] Although the clause was narrowly drafted, partisan debate over Congress's ability to limit the executive's authority to command the Army caused a stall in its conference committee.[105]

Congress introduced a broader version at the beginning of its forty-fifth session, which proscribed the use of both land and naval forces.[106] A compromise version that shortly followed gained wider support, however, by adding a punitive clause and limiting its scope to a single reference of the Army.[107] On June 18, 1878, President

98. FONER, *supra* note 86, at 234.
99. Christopher J. Whelan, *Military Intervention in Democratic Societies: The Role of Law*, *in* MILITARY INTERVENTION IN DEMOCRATIC SOCIETIES 264, 289 (Peter J. Rowe & Christopher J Whelan eds., 1985).
100. *Id.* at 289.
101. Furman, *supra* note 9, at 94 n.56-57.
102. *Id.*
103. *Id.* at 95 n.57.
104. Gates, *supra* note 21, at 1473 (quoting 7 Cong. Rec. 2119 (1877)).
105. O'Shaughnessy, *supra* note 89, at 709.
106. 7 CONG. REC. 3586 (1878).
107. 7 CONG. REC. 3845 (1878), *cited in* Furman, *supra* note 9, at 96 n.64.

Washington University Open Scholarship

Hayes signed the PCA into law. In order to further mollify Republicans, the final version included a clause allowing Constitutionally- or Congressionally-authorized military enforcement.[108]

C. The Drug War Amendments to the PCA

The PCA's most recent changes came out of President Reagan's "war on drugs" during the 1980s. During the early part of that decade, drug smuggling into the United States was on the rise, and had increased from an estimated $45 billion in 1979 to as much as $80 billion in 1981.[109] Civil authorities seemed unable to prevent this flood of drugs from crossing the borders. Some law enforcement estimates suggest that as much as eighty-five percent of illicit narcotics were entering the country unhampered.[110] Law enforcement agencies were hamstrung by budgetary and personnel shortages. Therefore, the legislative search for a solution turned to the military, the only component of the government with both the personnel and the equipment to combat the problem on a national level. Nicholas Mavroules, the Chairman of the Investigations Subcommittee of the House Armed Services Committee, recognized that "charging the military with the mission of detecting and monitoring the aerial and maritime transit of drugs into the United States, . . . capitalizes on the tremendous manpower and technology of the Department of Defense."[111]

In both the 1981 and 1988 hearings, there was strong opposition for the prospect of military involvement in counter-drug efforts, most notably from the DoD. Many military commanders remained concerned that this new mission would detract from their readiness to fight the nation's wars. In a hearing before Congress, Secretary of Defense Carlucci stated that "the Armed Forces should not become a

108. *Id.*

109. Roger Blake Hohnsbeen, *Fourth Amendment and Posse Comitatus Act Restrictions on Military Involvement in Civil Law Enforcement*, 54 GEO. WASH. L. REV. 404, 416 (1986).

110. Maj. Leroy C. Bryant, *The Posse Comitatus Act, the Military, and Drug Interdiction: Just How Far Can We Go?*, 1990-DEC ARMY LAW. 3 (1990).

111. Maj. Peter M. Sanchez, *The'Drug War': The U.S. Military and National Security*, 34 A.F. L. REV. 109, 126 n.173 (1991).

police force, nor can we afford to degrade readiness by diverting badly needed resources from their assigned missions."[112] Several other senior military officials, including the Vice Chair of the Joint Chiefs of Staff, echoed his argument in their subsequent testimony.[113]

In the end, however, Congress was most moved by the testimony of local and state governments and officials who pleaded for military assistance. Congress suspected that the DoD was opposied to the change only because it found counter-drug missions undesirable. It therefore voted to force military commanders to provide assistance to civil authorities, and moved to establish "clear legal principles regarding effective cooperation between the military and civilian law enforcement agencies."[114] The amendments to the PCA, codified in 10 U.S.C. §§ 371-381, called for the DoD to provide indirect assistance to law enforcement.[115] This support included intelligence, equipment, maintenance support,[116] use of military facilities,[117] specialized training and tactical advice.[118]

Military personnel could operate equipment in support of law enforcement if it related to: the "detection, monitoring, and communication of air and sea traffic;"[119] aerial reconnaissance; and, most importantly, the interception of aircraft outside the United States "for the purpose[] of direct[ing them] . . . to a location designated by appropriate civilian officials."[120] However, Congress also defined strict limits for the permissible degree of military involvement, precluding servicemen from becoming involved in active measures such as "search and seizure, and arrest, or other similar activities."[121] In an attempt to mollify military hardliners, Congress conceded that the DoD could refuse a request for help if it would "adversely affect the military preparedness of the United

112. *Id.* at 124.
113. *Id.* at 124.
114. Bryant, *supra* note 110, at 6.
115. 10 U.S.C. § 374 (1988).
116. *Id.*
117. 10 U.S.C. § 372 (a) (1988).
118. 10 U.S.C. § 373 (1988).
119. 10 U.S.C. § 374(2)(a) (1988).
120. *Id.* at § 374(2)(d).
121. 10 U.S.C. § 375 (1988).

Washington University Open Scholarship

States,"[122] while also requiring civilian authorities to reimburse the military for assistance provided.[123]

Congress also directed the Secretary of Defense to draft regulations establishing military policy to reflect the newly revised PCA.[124] The subsequent DoD directives echoed many provisions of the PCA, including a prohibition of active law enforcement. Additionally, it prohibited any other activity which would cause federal troops to become involved in the interdiction of land, sea, or air transportation without the authorization of civilian law enforcement.[125] The regulations also provided that military personnel are not to be used for the "surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators."[126] Notably, although the PCA did not expressly include the Navy and the Marine Corps as a matter of law, the DoD provided that the restrictions would apply to these services as a matter of policy.[127]

III. EROSION OF POSSE COMITATUS: THE EXCEPTIONS

The PCA contains an exception clause, providing that in "circumstances expressly authorized by the Constitution or Act of Congress,"[128] military forces may be used to enforce the law. Although this clause was primarily added to the text to insure the bill's passage in the face of Republican opposition, it has since taken on a life of its own. Especially since the end of World War II, the dramatic growth of federal powers, and the extensive delegation of legislative authority to the President, has resulted in a series of significant exceptions to the clause. First, as the exact boundaries of unilateral executive power are not completely defined in the Constitution, the President may interpret the Constitution to allow the President to wield extensive emergency powers. Second, Congress

122. 10 U.S.C. § 376 (1988).
123. 10 U.S.C. § 377 (1988).
124. 10 U.S.C. § 375 (1982).
125. Dep't of Def. Directive (DODD) 5525.5, at § E2.1.8, § E4.1.6.2.4.2.1 (Jan. 15 1986) [hereinafter DODD].
126. *Id.* at § E4.1.3.4.
127. Cooperation with Civilian Law Enforcement Officials, Dep't of the Navy SECNAV Instruction SECNAVINST 5820.7B, at 3-4, (Mar. 28, 1988) [hereinafter SECNAVINST].
128. 18 U.S.C. § 1385 (1982).

has passed numerous exceptions to the PCA in response to modern national security threats such as drugs, terrorism, and weapons of mass destruction. These include the 1981 and 1988 amendments, disaster response procedures, the enforcement of the Uniform Code of Military Justice, and, importantly, the legal authority for the President to respond forcibly to insurrection, rebellion, or civil unrest.[129]

A. "Except in cases expressly Authorized by the Constitution or act of Congress . . . "; The Constitutional and Legislative Exceptions to the PCA

The PCA specifically recognizes both constitutional and legislative exceptions. Of the two, the concept of a constitutional exception is more problematic. The Constitution does not specifically prohibit using the military to enforce the law. Furthermore, the congressional record indicates that the PCA's wording was a compromise intended to secure Congress's approval, rather than a reference to some explicit form of authority.[130] Analysis of this clause suggests that the Presidential emergency powers might fall within this clause, but the boundaries of executive power remain "relatively unexplored."[131] Though Congress legislated presidential authority to respond to insurrections and invasions with military force, the amount of unilateral that authority the President has to enforce the law outside remains substantially undefined.

In support of emergency powers, scholars point to the founder's apparent intention to create an "energetic executive" in the Presidency.[132] In support of this view, scholars posit that it is "essential to the protection of the community against foreign attacks . . . [and] the steady administration of the laws,"[133] and crucial to the nation as "the bulwark of national security."[134] They do, however, harbor deep suspicions about the dangers of centralized authority and

129. 18 U.S.C. § 1385 (1982).
130. O'Shaughnessy, *supra* note 89, at 712 n.49.
131. United States v. Walden, 490 F.2d 372, 376 (9th Cir. 1974).
132. THE FEDERALIST NO. 70 (Alexander Hamilton).
133. *Id.*
134. *Id.*

Washington University Open Scholarship

a standing army, and thus grant the military's most crucial safeguards to the legislature. As such, the extent of the President's emergency military powers may only occupy the "zone of twilight" where the President may act if Congress has not.[135]

Proponents of executive authority still attest that sufficient support exists within the Constitution to imply that the President has extensive emergency powers. They generally rely on Articles III and IV, [136] but draw the broadest authority from Article II's charge that the President should "take Care that the Laws be faithfully executed."[137] Secondary sources, such as the writings of Alexander Hamilton, James Madison, and John Jay, also offer general support to this theory, arguing that broad executive powers are essential to the defense of liberty:

> [I]t is impossible to foresee or define the extent and variety of national exigencies, and the correspondant extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite; and for this reason, no constitutional shackles can wisely be imposed on the power to which the care of it is committed.[138]

A limited amount of case law supports this theory, suggesting that the President has an implied duty to enforce both the law and the "law of the land" by military force, if necessary.[139] The latter contains treaties and obligations implied by the Constitution, and responsibilities derived from presidential duties.[140] *In re Debs*[141] also suggests that the President has military means at his disposal to enforce the law. "If the emergency arises, the army of the nation, and all of its militia, are at the service of the nation to compel obedience to its laws."[142] Other secondary sources such as DoD regulations and

135. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).
136. Gates, *supra* note 21, at 1486 n.155.
137. U.S. CONST. art. II, § 3.
138. THE FEDERALIST NO. 23 (Alexander Hamilton).
139. Furman, *supra* note 9, at 91 (quoting In re Neagle, 135 U.S. 1 (1890) and Logan v. United States, 144 U.S. 263 (1891)).
140. *Id.*
141. 158 U.S. 564, 582 (1895).
142. *Id.*

supporting opinions by the Department of Justice also refer to the government's "inherent right . . . to ensure the preservation of public order and to carry out governmental operations . . . by force, if necessary."[143]

There is also the question of the constitutional validity of legislative limitations, such as the PCA, on the President's authority to command the military. In 1957, Attorney General Herbert Brownell, Jr., advised President Eisenhower that the PCA does not make the President "impotent" to respond to a domestic crisis.[144] Brownell argued, in reference to enforcing school desegregation in the South, that "there are in any event grave doubts as to the authority of the Congress to limit the constitutional powers of the President to enforce the laws and preserve the peace under circumstances which he deems appropriate . . . a power essential to protection against pressing dangers . . . may well be deemed inherent in the executive office."[145] Brownell thus suggested that Congress may not legislate away the executive's authority to use troops as needed.

Opponents counter that the President does not hold any inherent emergency authority, as the Constitution makes no mention of a power to use the military to enforce the law. Instead, only Congress is authorized to "call forth the militia to execute the laws of the Union."[146] The findings expressed in *Ex Parte Milligan*,[147] and the concurring opinions in *Duncan v. Kahanamoku*,[148] both rejected the assertion that Presidential command of the military is beyond restriction. They held that although there "resides in the executive branch . . . [the power] to preserve order and insure the public safety in times of emergency," [149] it does "not extend beyond what is required by the exigency that calls it forth."[150] It is "of a most temporary character,"[151] and subject to judicial review. Furthermore,

143. SECNAVINST, *supra* note 127, at 4.
144. 41 Op. Att'y. Gen. 313, 331 (1957).
145. *Id.*
146. U.S. CONST. art. I, § 8, cl. 15.
147. Ex Parte Milligan, 71 U.S. 2 (1866).
148. Duncan v. Kahanamoku, 327 U.S. 304 (1946).
149. *Id.* at 335.
150. *Id.*
151. *Id.* at 326.

Washington University Open Scholarship

the congressional record indicates that the drafters of the PCA intended its prohibitions to apply to everyone who successfully ordered the Army to execute the laws, "from the Commander-in-Chief down to the lowest officer in the Army who may presume to take upon himself to decide when he shall use the military force in violation of the law of the land."[152]

As Justice Jackson indicated in *Youngstown*, where Congress has acted, presidential authority is at its maximum.[153] Congress has granted explicit authority to the President to employ military force to enforce the law in a limited number of circumstances, which comprise the legislative exceptions to posse comitatus. Of these laws, the Insurrection Statutes provide the President with the most substantial powers to enforce the law. The first, now codified as 10 U.S.C. § 331, originates from the Whiskey rebellion of 1792.[154] It provides that in the case of "an insurrection in any State against its government,"[155] the President may use the militia to suppress it. Its companion section, 10 U.S.C. § 332, gives the President substantial discretion to use the military in a variety of other domestic disturbances:

> Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States make it impracticable to enforce the laws . . . by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.[156]

The President's insurrection powers reach their apex under 10 U.S.C. § 333, which states:

> The President, by using the militia or the armed forces . . . shall take such measures as he considers necessary to suppress,

152. Furman, *supra* note 9, at 98 n.75.
153. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 631-55 (1952).
154. Stevens, *supra* note 69, at 15.
155. 10 U.S.C. § 331 (1994).
156. 10 U.S.C. § 332 (1994).

> in a State, any insurrection, domestic violence, unlawful combination, or conspiracy if it—
>
> (1) So hinders the execution of the laws of that state, and of the United States . . . that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law . . . [or]
>
> (2) Opposes or obstructs the execution of the laws . . . or impedes the course of justice under those laws.[157]

The reach of Section 333 is tremendous, as it broadly states that "mere frustration" is enough to trigger the President's authority to employ military force.[158] This is an exceedingly low threshold. Additionally, listing the deprivation of a "right" as a justifying factor accords the President with considerable discretion to militarily intervene in any situation where a civil liberty might be threatened.

A series of other statutory authorizations allow the President or the military to act in a limited number of circumstances. Congress has authorized the military to enforce the Uniform Code of Military Justice,[159] which allows the military to apprehend any soldier who has committed a criminal offense if it "reflects discredit upon the service."[160] Additionally, statutes provide that: the military may directly intervene to support territorial governors;[161] the Secret Service may investigate crimes against the President, members of Congress, or other dignitaries;[162] remove unauthorized persons from Indian lands;[163] preserve national parks;[164] and to enforce customs and quarantine laws.[165] The Stafford Act[166] also allows the President to provide federal troops to state governors for disaster relief

157. 10 U.S.C. § 333 (1994).
158. *Id.*
159. Furman, *supra* note 9, at 121 n.223 (citing Uniform Code of Military Justice, Articles 7(1) & 734).
160. *Id.*
161. 48 U.S.C. § 1418 (1982).
162. 18 U.S.C. §§ 351(a), 1116(d), 1751(i) (1982). *See also* 18 U.S.C. § 3056 (1997).
163. 25 U.S.C. § 180 (1982).
164. 16 U.S.C. §§ 23, 78, 593 (1982).
165. 42 U.S.C. § 97 (1982). *See also* 50 U.S.C. § 220 (1982); SECNAVINST, *supra* note 127, at 5.
166. 42 U.S.C. § 5121 (2000).

Washington University Open Scholarship

operations. The President has frequently relied on this authority in cases of national emergency, exercising it in response to both natural and man-made disasters. The Army assisted with relief efforts in the wake of Hurricane Hugo in the early 1990s,[167] and helped control the riots in Los Angeles that followed in the wake of the Rodney King verdict.[168]

The 1981 amendments to the PCA also directed the Secretary of Defense to issue regulations to implement the PCA.[169] Department of Defense directives assert military authority to either enforce the law or provide assistance in emergency circumstances. Under this "immediate response authority," the military may act to enforce the law or to provide other needed assistance in crisis situations without specific orders from the national command authority. The directive authorizes:

> [P]rompt and vigorous Federal action, including use of military forces, to prevent loss of life or wanton destruction of property and to restore governmental functioning and public order when sudden and unexpected civil disturbances, disaster, or calamities seriously endanger life and property and disrupt normal governmental functions to such an extent that duly constituted local authorities are unable to control the situation.[170]

The emergency, however, must be either temporary, or entail a situation where the local authorities cannot or will not give sufficient protection.[171] This doctrine can be used to justify military assistance in the wake of the San Francisco fire and earthquake in 1906,[172] and

---

167. *See* JANET A. MCDONNELL, PUB. NO. EP 870-1-44, RESPONSE TO THE LOMA PRIETA EARTHQUAKE, v-vi (1993), *at* http://www.usace.army.mil/publications/eng-pamphlets/ep870-1-44 (last visited Feb. 17, 2003).

168. *See Los Angeles Riot Still Echoes a Decade Later*, CNN.com, Apr. 29, 2002 (on file with the WASHINGTON UNIVERSITY JOURNAL OF LAW AND POLICY).

169. 10 U.S.C. § 375 (1982).

170. DODD, *supra* note 125, at § E4.1.2.3.1, e4.1.2.3.2. *See also* SECNAVINST *supra* note 127, at 4.

171. Furman, *supra* note 9, at 105-06 n.125.

172. Furman, *supra* note 9, at 105 & n.121 (citing Office of the Judge Advocate General, Federal Aid in Domestic Disturbances, S. Doc. Vol. 19, 67th Cong., 2d Sess. 26, 309-10 (1922)).

in the capture of President McKinley's assassin in 1901.[173] In recent years, the military provided unsolicited emergency assistance in the form of "medevac ambulances, bomb detection dog teams, and various military personnel" after the bombing of the Murrah Federal building in Oklahoma City.[174]

B. "Any part of the Army": The Branch and Status of Service Exceptions to the PCA

The PCA's "any part of the Army" clause has given rise to a number of exceptions as to which forces are covered by the PCA. The first draft, a rider on an Army appropriations bill, mentioned only the Army as being subject. Modern versions have also included the Air Force.[175] Although one of the PCA's draft proposals formerly included "all ground and naval forces," the Navy and the U.S. Marine Corps are not specifically mentioned in the current version.[176] The historical record suggests the naval clause was likely cut from the PCA because of its inappropriateness on an Army appropriations bill, and also as a means to narrow its focus in order to assure its passage. A DoD regulation drafted in the wake of the 1981 Amendments to the PCA, however, indicated that it reserves the right to make case-by-case exceptions to this policy with the Secretary of Defense's approval.[177] Thus, this reservation raises the possibility that personnel from these services could still be used for law enforcement.

---

173. *Id.* at 105 n.122 (citing NEW YORK TIMES, Sept. 7, 1901, at 1).

174. Maj. Kirk L. Davies, *The Imposition of Martial Law in the United States*, 49 A.F. L. REV. 67, 83 (2000).

175. The Air Force's inclusion is partly due to its origins in the Army as the U.S. Army Air Corps and its deliberate addition to the bill when Congress incorporated the PCA into Title 18 in 1956. Furman, *supra* note 9, at 96 n.70.

176. Some scholars have also pointed out the general inapplicability of the PCA to a naval force. They note that navies operate almost exclusively beyond their country's borders. In addition, customary international law generally acknowledges navies as the enforcers of national law on the high seas. *See* Christopher A. Abel, *Not Fit for Sea Duty: The Posse Comitatus Act, the United States Navy, and Federal Law Enforcement at Sea*, 31 WM. AND MARY L. REV. 445, 457-60 (1990).

177. SECNAVINST, *supra* note 127, at 4. *See also* DODD 5525.5, *supra* note 125, at § E4.3.

Washington University Open Scholarship

A limited number of cases have addressed possible posse comitatus violations by Navy or Marine Corps personnel.[178] In *United States v. Walden*, Marines acting as undercover agents contributed to a civilian investigation of the illegal sale of firearms. The defense argued that the Marines violated military regulations as well as the PCA in their capacity as witnesses. They moved to apply the exclusionary rule against the evidence. The Fourth Circuit court affirmed the conviction, holding that the Marines' actions violated Navy regulations, but not the PCA.[179] The Ninth Circuit, in *United States v. Roberts*, also declined to extend the PCA to the Navy in the face of "plain language," as its prohibitions only apply to the Army and Air Force.[180]

The status of the service member—active duty, reserve, or National Guard—is as important as the branch of military service in determining whether the PCA is applicable. The PCA has been held to apply only to those soldiers in federal service under Title 10.[181] Hence, the Army National Guard or Reserve in Title 32 state service,[182] or the United States Coast Guard under Title 14,[183] are not considered within "any part of the Army" for purposes of the PCA.

---

178. *See* United States v. Walden, 490 F.2d 372 (4th Cir. 1974); United States v. Roberts 779 F.2d 565 (9th Cir. 1986); United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1988). *See also* United States v. Rasheed, 802 F.Supp. 312, 324 (D. Haw. 1992); United States v. Mendoza-Cecelia, 963 F.2d 1467, 1477-78 (11th Cir. 1992).

179. *Walden*, 490 F.2d at 376.

180. *Roberts,* 779 F.2d at 567.

181. Gilbert v. United States, 165 F.3d 470, 473 (6th Cir. 1999). *See also* Perpich v. Dep't of Def., 496 U.S. 334, 345-46 (1990).

182. DODD, *supra* note 125, at § E4.2.

183. The Coast Guard is a hybrid agency, organized under both Title 14 and the Department of Transportation. Its charter gives it a specific law enforcement mission—to "enforce or assist in the enforcement of all applicable federal laws on and under the high seas and waters subject to the jurisdiction of the United States." *See* 14 U.S.C. § 2 (1994). The Coast Guard is also, however, "a military service and a branch of the Armed Forces," operating in the service of the Navy. *See* 14 U.S.C. §§ 1, 3 (1977); 14 U.S.C.A. § 3 (1977). A variety of courts have held that the PCA does not apply to the Coast Guard. *See* Jackson v. State, 572 P.2d 87, 93 (Alaska 1977). *See also* United States v. Chaparo-Almeida, 679 F.2d 423, 425 (5th Cir. 1982); *Mendoza-Cecelia*, 963 F.2d at 1477-78. Additionally, it is questionable whether the "any part of the army" clause in the PCA covers civilian DoD employees. Current DoD regulations exclude such personnel, even if they are investigators working under a military officer to enforce civilian law. *See* DODD, *supra* note 125, at § E4.2.3. *But see* United States v. Chon, 210 F.3d 990, 993 (9th Cir. 2000), where members of the Naval Criminal Investigative Service were found to be within the PCA as they were part of the "strength and authority" of the military, even as private individuals within that institution.

As a result, an analysis of the status of the soldier is determinative to the applicability of the PCA. This is complicated, however, due to the National Guard's construction as a hybrid organization with both federal and state aspects. Guardsmen simultaneously hold membership in both the National Guard of each state, and the National Guard of the United States.[184] The federal military trains, equips, and funds state National Guardsmen, but the Guardsmen remain outside the boundaries of the national military until they are placed into federal service.[185] Separating federalized National Guard from state controlled guardsmen is based entirely on whether the President or the Governor maintains command and control—not whether state or federal money funds operations.[186] As explained by the D.C. District Court in *United States v. Dern*:[187]

> [E]xcept when employed in the service of the United States, officers of the National Guard continue to be officers of the state and not officers of the United States or of the Military Establishment of the United States. . . . The United States may organize, may arm, and may discipline, but all of this is in contemplation of, and preparation for, the time when the militia may be called into the national service. Until that event, the government of the militia is committed to the states.[188]

When the guard operates as a state militia, the state Governor retains command. The Governor may employ the guard in "civilian support missions," without consulting the DoD.[189] When the guard is

---

184. Lt. Col. Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of 'In Federal Service,'* 1994-JUN. ARMY LAW. 35, 37-38 (1994). See also *Perpich*, 496 U.S. at 345.

185. United States v. Dern, 74 F.2d 485 (D.C. Cir. 1934).

186. Rich, *supra* note 184, at 40.

187. *Dern*, 74 F.2d 485.

188. *Id.* at 487.

189. Kurt Andrew Schlichter, *Locked and Loaded: Taking Aim at the Growing Use of the American Military in Civilian Law Enforcement Operations*, 26 LOY. L.A. REV. 1291, 1307 (1993). Additionally, National Guard Units may undertake counter-drug missions so long as they remain in state service. Guard units doing drug sweeps receive federal funds so long as they are state-controlled. *See* 32 U.S.C. § 112(a)(1) (2000). The advantage of this approach is that the Guard PCA remaining in state authority will circumvent the in state authority, thus allowing them to undertake federally-funded active law enforcement measures which would be prohibited if they were under actual federal control. *See also* United States v. Hutchings, 127

Washington University Open Scholarship

federalized, the President assumes command, and the PCA applies.

It is also important to note that the PCA applies only to on-duty servicemen. It does not apply to off-duty forces acting, as Lord Mansfield would have suggested, in their private capacity as citizens.[190] Such "private service" could include reporting crimes, suspicious activity, or making citizen's arrests while off-post.[191] In any circumstance, the soldier must not be compelled by order to serve as a "volunteer." He has to be acting purely in a personal capacity.[192] Aid given "under the control or direction," or circumstances equating to operating with the knowledge and acquiescence of a superior, would likely constitute as official military action.[193]

C. "To Execute the Laws": The Level of Assistance Exceptions

Another exception to the PCA is the level of military involvement that is needed to constitute an "execution" of the law as defined by the PCA. Contradictory holdings in a series of cases arising out of the 1973 Wounded Knee standoff—*United States v. Jamarillo*,[194] *United States v. Red Feather*,[195] and *United States v. McArthur*[196]—prompted Congress to amend the PCA in 1981. This dramatically widened the scope of permissible military involvement.

On February 27, 1973, radical members of the American Indian Movement stormed the village of Wounded Knee on the Pine Ridge Indian reservation in South Dakota. The band occupied the town, looted stores, and broke into its post office.[197] They then took hostages and established an armed perimeter around the area. Officers from the FBI, the Bureau of Indian Affairs, and the U.S. Marshals surrounded the site, sealing it off with a series of roadblocks. Both sides remained in place for the next seventy-one

---

F.3d 1255 (10th Cir. 1997); United States v. Benish, 5 F.3d 20 (3rd Cir. 1993).

190. DODD, *supra* note 125, at §E4.2.4.
191. Meeks, *supra* note 78, at 126 n.242.
192. Meeks, *supra* note 78, at 126.
193. *Id.* at 127. *See also* DODD, *supra* note 125, at §E4.2.4.
194. United States v. Jamarillo, 380 F. Supp. 1375 (D. Neb. 1974).
195. United States v. Red Feather, 392 F. Supp. 916 (D.S.D. 1975).
196. United States v. McArthur, 419 F. Supp. 186 (D.N.D. 1975).
197. *Jamarillo*, 380 F.Supp. at 1377.

days, exchanging periodic gunfire.[198]

Four days after the standoff began, Colonel Volney Warner, Chief of Staff for the U.S. Army's 82nd Airborne Division, and Colonel Jack Potter, the Sixth Army's Deputy Chief of Staff for Logistics, were ordered to the site to determine if military assistance would be required.[199] The colonels evaluated the situation and advised against military involvement, but they remained at the scene to provide their advice and counsel.[200] They authorized the transfer of armored personnel carriers from the South Dakota National Guard to the control of law enforcement officers at the scene, and provided for Guardsman mechanics to maintain them.[201] The colonels also requisitioned considerable stores of military equipment, including sniper rifles, ammunition, and flares for the FBI's use, and ordered aerial surveillance of the site by military aircraft.[202]

The Defendants in *Red Feather*, *McArthur*, and *Jamarillo* were captured while trying to break through the roadblocks that prevented entry to Wounded Knee. They were charged with a violation of 18 USC § 231(a)(3), prohibiting the obstruction of peace officers "lawfully engaged in the lawful performance of [their] official duties."[203] Seeking to prove that the government agents were not "lawfully engaged," the defense sought to introduce evidence of the military's involvement in the standoff, and argued that the PCA made such military involvement improper.[204] In response, the government filed a motion *in limine* to restrict the introduction of evidence of military support.[205]

In the leading Wounded Knee case, *United States v. Red Feather*, the district court interpreted the PCA's "uses any part of the Army or the Air Force as a posse comitatus or otherwise" to mean only "direct active use"[206] in executing the law. Such active support includes

198. *Id.*
199. *Id.* at 1379.
200. *Id.*
201. *Id.* at 1379-1380.
202. *Id.*
203. *Id.* at 1376.
204. *Id. at* 1375.
205. United States v. Red Feather, 392 F. Supp. 916, 918 (D.S.D. 1975).
206. *Id.* at 922.

Washington University Open Scholarship

"arrest, seizure of evidence, search of a person, . . . investigation of crime, interviewing witnesses, pursuit of an escaped civilian prisoner, . . . and other like activities."[207] The holding in *Red Feather* stands for the proposition that providing material and equipment from the military to law enforcement is merely passive assistance, and therefore the PCA does not prohibit it.

The outcome in *United States v. Jamarillo* differed significantly from *Red Feather*. As a test of improper military involvement, the *Jamarillo* court sought to determine whether the military's assistance "pervaded the activities" of civilian authorities.[208] The *Jamarillo* court ruled that the military's provision of supplies and equipment was not a *de jure* violation. Nevertheless, it ultimately held that the military advisors' influence on the FBI's negotiations, the use of equipment, and the policy regarding the use of force, raised sufficient doubt as to whether the civilian officers were "lawfully engaged" in the performance of their duty.[209] Thus, the court dismissed the indictment because the government failed to meet its burden of proof.[210]

The third case, *United States v. McArthur*, affirmed by the Eighth Circuit in *United States v. Casper*,[211] crafted a different standard for determining whether the military's involvement exceeded the PCA's boundaries. The district court asked whether "military personnel subjected . . . citizens to the exercise of military power which was regulatory, proscriptive, or compulsory in nature."[212] Applying this test, it found no PCA violation, ruling that Colonel Warner's influence on the Wounded Knee standoff was primarily a result of his expertise.[213] Likening the lending of advisors to the lending of military equipment, the court analogized that "to my mind, Colonel Warner was borrowed as a vehicle might be borrowed."[214] The associated Wounded Knee case, *United States v. Yunis*, clarified the

207. *Id.* at 925.
208. *Jamarillo*, 380 F. Supp. at 1379.
209. *Id.* at 1378.
210. *Id.* at 1381.
211. United States v. Casper, 541 F.2d 1275 (8th Cir. 1976).
212. United States v. McArthur, 419 F. Supp. 186, 194 (D.N.D. 1975).
213. *Id.* at 194-95.
214. *McArthur*, 419 F. Supp. at 195.

factors of the *McArthur* test.[215] In *Yunis*, the district court relied on *McArthur*'s "regulatory, proscriptive, or compulsory" standard, holding that "a power regulatory . . . controls or directs, . . . a power proscriptive in nature . . . prohibits or condemns, . . . and a power compulsory in nature exerts some coercive force."[216]

The contradictory decisions in *Red Feather*, *Jamarillo*, and *McArthur* threw the understanding of the PCA into disarray. Specifically, issues arose among both the military and civil authorities as to what comprised an actual violation of the PCA and to what degree the military can assist civil authorities. Although the government successfully defeated in the posse comitatus defense in both *Red Feather* and *McArthur*, the substantial differences in the three decisions cast doubt onto the boundaries of PCA violations.

The 1981 amendments to the PCA were intended to resolve much of this confusion. To pave the way for a DoD role in the "war on drugs," Congress established clear legislative guidance on what sort of assistance was permissible. Congress adopted *Red Feather*'s "active versus passive" standard, allowing the government considerable freedom to provide military assistance to local authorities.[217] By defining the prohibited "active" measures, such as search, seizure, and arrest, the first three sections of the 1981 amendments clearly favored the *Red Feather* holding. These provisions allowed the DoD to provide many of the same sorts of passive aid that had been challenged in the Wounded Knee cases: providing equipment, supplies, technical assistance, intelligence, and training.

The DOD's directives, issued subsequent to the PCA's amendments, were also in line with the Wounded Knee decisions. These decisions adopted the *McArthur* test as a supplemental standard for determining an improper level of military assistance. By establishing that the Navy or Marine Corps are potentially exempt from the PCA, the directives require the Secretary of Defense's approval before either service engages in the "interdiction of a vessel or aircraft, a law enforcement search or seizure, an arrest,

215. United States v. Yunis, 681 F. Supp. 891 (D.C. Cir. 1988).
216. *Id.* at 895-96.
217. United States v. Red Feather, 392 F. Supp. 916, 924-25 (D.S.D. 1975).

Washington University Open Scholarship

apprehension, or other activity that is likely to subject civilians to the use of military power that is regulatory, prescriptive or compulsory."[218]

D. Pushing the Boundaries of the PCA: Defining PCA Violations and Applying an Exclusionary Rule

Over the years, defense attorneys have pressed courts to strengthen the PCA by adopting an exclusionary rule for evidence obtained by military personnel who are acting in violation of its terms. The courts have been very reluctant to broaden the powers of the PCA beyond its strict interpretation as a criminal statute. Relying heavily on a narrow view of both the statutory language and the legislative record, the courts have almost unanimously avoided the question by not finding a PCA violation. More interestingly, they have also refused to enforce an exclusionary rule, even in the face of clear violations. The judiciary's resistance to broadening the PCA's protections is significant, because it demonstrates the courts' continuing deference to military activity and unwillingness to counterbalance the increasing exceptions to the PCA with substantial evidentiary power.

Historically, many PCA-related cases arose from the "best of intentions." These include the base commanders' efforts to help their civilian counterparts in criminal investigations or in military asset loans to pursue and capture escaped convicts.[219] One scholar describes the historical trend as the military's "understandable temptation to help the local authorities, born of morality and the desire for good public relations."[220] The author notes that such "temptation may lead to subterfuge,"[221] when military personnel who are eager to help invent excuses to intervene in violation of beyond the PCA mandates.

In the 1981 PCA amendments, Congress explicitly encouraged the military to perform training exercises for assisting law enforcement,

218. DODD, *supra* note 125, at § E4.3.2.
219. Meeks, *supra* note 78, at 110.
220. Furman, *supra* note 9, at 118.
221. *Id.* at 118.

but only as "an incidental aspect of training performed for a military purpose."[222] For example, the congressional record suggests that "the scheduling of routine training missions can easily accommodate the need for improved intelligence information covering drug trafficking in the Caribbean."[223] This instruction provides a considerable opportunity for the military to circumvent the PCA. In effect, holding riot control training in an area beset by civil disorder,[224] or conducting infantry field exercises in a forest where a convict is on the run,[225] stretches the PCA to its breaking point. Major Furman condemns such trickery "as violative of both the letter and the spirit of the law."[226] Department of the Navy regulations sternly warn that ostensibly military-directed activities should not be used as a "subterfuge" to provide covert assistance.[227]

As a result of these ambiguities, judicial analysis of military assistance to civilians has often turned on either the military purpose doctrine or the degree of military personnel involvement. Under the military purpose doctrine, military action that enforces civil law is legitimate when its primary purpose will either further a military function or enforce the Uniform Code of Military Justice, "regardless of the incidental benefits to civilian authorities."[228] This includes military law enforcement cases where there is reasonable ground to believe that a crime is related to military personnel, or when a civilian commits a crime that affects a military installation.[229]

A series of cases have upheld the validity of military investigations on the basis of the military purpose doctrine.[230] In

---

222. Col. Paul Jackson Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 104 MIL. L. REV. 109, 114 (1984) (quoting DODD 5525.5, Encl. 2, para. A.5 (Mar. 22, 1982)).

223. *Id.* at 114 (quoting H.R. Rep. No. 87-71, at 8).

224. *Id.* at 121.

225. Furman, *supra* note 9, at 118-19.

226. *Id.* at 119.

227. SECNAVINST, *supra* note 127, at 4.

228. DODD, *supra* note 125, at § E4.1.2.1. *See also* Furman, *supra* note 9, at 112-26; Rice, *supra* note 222, at 128; Meeks, *supra* note 78, at 124-26.

229. Jonathan W. Hitesman, *Fighting in Another Direction: The Posse Comitatus Act and the War on Drugs in Hawai'i Under State v. Pattioay,* 18 U. HAW. L. REV 835, 843 (1996).

230. *See* United States v. Hartley, 486 F. Supp 1348 (D. Fla. 1980); United States v. Bacon, 851 F.2d 1312 (11th Cir. 1988); United States v. Hartley, 796 F.2d 112 (5th Cir. 1986). *See also* United States v. Chon, 210 F.3d 990 (9th Cir. 2000); United States v. Thompson, 33 M.J. 218, 221 (C.M.A. 1991); United States v. Hitchcock, 286 F.3d 1064 (9th Cir. 2002); Applewhite v.

Washington University Open Scholarship

United States v. Hartley, the defendants were under contract to sell shrimp to the DoD.[231] A military investigation revealed that the defendants tampered with samples of their products in order to conceal the fact that their goods were substandard. The defendants claimed that the indictment should be dismissed because the Air Force investigators were operating in violation of the PCA.[232] The court denied the defendants' motion, holding that the investigation "involved military personnel . . . performing functions they would normally perform in the course of their duties."[233]

The Eleventh Circuit used a similar line of reasoning in *United States v. Bacon*.[234] In *Bacon*, the military's investigative service, the Criminal Investigation Division ("CID"), and the Georgia Bureau of Investigation, conducted a joint investigation that culminated when an undercover military investigator made a covert purchase from the defendant. Considering the military's level of involvement in the investigation, the *Bacon* court ruled that there was no violation of the PCA.[235] The military investigator assisted his civilian counterparts "only to the extent of activities normally performed in the ordinary course of his duties,"[236] with no evident "military permeation of civilian law enforcement."[237]

In finding PCA violations, the courts also considered the breadth of participation by military personnel in their law enforcement duties.[238] Under this standard, a violation during the military's investigation is potentially indicated by the arrest of civilians, soldiers drawing their weapons in the course of their investigation, and the search, seizure, or administrative handling of suspects and evidence during arrest.[239] In *United States v. Yunis*,[240] the defendant, a

---

United States Air Force, 995 F.2d 997 (10th Cir. 1993).

231. United States v. Hartley, 486 F. Supp. 1348 (1980).

232. *Hartley*, 486 F. Supp. at 1357.

233. *Id.*

234. *Bacon*, 851 F.2d 1312.

235. *Id.*

236. *Bacon*, 851 F.2d at 1313-14.

237. *Id.* at 1314.

238. *See* North Carolina v. Trueblood, 265 S.E.2d 662 (N.C. Ct. App. 1980); *see also* United States v. al-Talib, 55 F.3d 923, 930 (4th Cir. 1995); Burns v. Texas, 473 S.W.2d 19 (Tex. Crim. App. 1971).

239. Hitesman, *supra* note 229, at 857.

240. United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991). *Accord* United States v.

Lebanese hijacker, argued that the FBI committed a posse comitatus violation after it captured him overseas and transferred him to Navy custody for transport back to the United States. The court dismissed his argument, rehashing the Wounded Knee decisions to find that the Navy may only provide indirect assistance when it does not constitute "the exercise of regulatory, proscriptive, or compulsory power."[241] Further, the court held that such action does not "amount to direct active involvement in the execution of the laws,"[242] or "pervade the activities of civilian authorities."[243] In *North Carolina v. Trueblood*, the state court of appeals found no PCA violation where an Army criminal investigations officer rode as a passenger in a police car, wore no uniform, carried no weapon, and merely provided the police officer with the name and address of the suspect, an officer in the Army.[244]

Even when the courts have found a violation of the PCA, they have still been surprisingly reluctant to enforce an exclusionary rule. The PCA does not provide that evidence gathered in violation of its terms is inadmissible. However, the congressional record indicates that the PCA was intended solely as a punitive measure against soldiers or civilians who would use the military to enforce a political agenda. The leading precedent in this line of cases, *United States v. Walden*,[245] noted that "[the PCA] expresses a policy that is for the benefit of the people as a whole, but not one that may be fairly characterized as expressly designed to protect the personal rights" of individual citizens.[246] Similarly, in *State v. Pattioay*,[247] the Hawaiian Supreme Court ruled that the PCA is not "analogous" to constitutional rights. The court stated that the evidence must be suppressed when such rights are violated, as the PCA creates no such freedom for military investigations.[248]

Khan, 35 F.3d 426 (9th Cir. 1994).

241. *Yunis*, 924 F.2d at 1094.
242. *Id.* at 1094.
243. *Id.* at 1094.
244. *Trueblood*, 46 N.C. App. at 543.
245. United States v. Walden, 490 F.2d 372 (4th Cir. 1974).
246. *Id.* at 377 n.11.
247. State v. Pattioay, 896 P.2d 911 (Haw. 1995).
248. *Id.* at 922.

Washington University Open Scholarship

In *Walden*, the Fourth Circuit opted not to impose the "extraordinary remedy"[249] of an exclusionary rule. Relying on both the relative obscurity of the rule and the limited number of reported violations, the court concluded that "[s]hould there be evidence of widespread or repeated violations . . . we will . . . consider whether adoption of an exclusionary rule is required as a future deterrent."[250] Most courts have followed *Walden*'s lead.[251] In *United States v. Wolffs*,[252] the Fifth Circuit deferred from resolving the case on PCA grounds. Instead, the court held that even if the involvement of a CID investigator who is acting as an informant for local law enforcement would violate the PCA, it would still refrain from applying the exclusionary rule. The court stated unequivocally that only if they were "confronted in the future with widespread and repeated violations of the Posse Comitatus Act, . . . [would] . . . an exclusionary rule . . . be fashioned at that time."[253] The court in *United States v. Roberts*[254] came to a similar holding, observing that the courts have "uniformly refused to apply the exclusionary rule to evidence seized in violation of the Posse Comitatus Act."[255] In *United States v. Cotton*,[256] the Ninth Circuit denied the application of the exclusionary rule by simply stating that "the remedy requested exceeds that required by the conduct."[257]

IV. HOMELAND DEFENSE: ENDS JUSTIFYING MEANS

Homeland defense and domestic security was not a priority for the U.S. military before the September 11, 2001, terrorist attacks. Many senior officials in the intelligence community and the Bush and Clinton Administrations had been warning the military for several

249. *Walden*, 490 F.2d at 373.
250. *Id.* at 377.
251. Hitesman, *supra* note 229, at 858 n.162. *See* United States v. Roberts, 779 F.2d 565, 568 (9th Cir. 1986). *See also* United States v. Mendoza-Cecelia, 963 F.2d 1467, 1478 (11th Cir. 1992); United States v. Rasheed, 802 F. Supp. 312, 324 (D. Haw. 1992); State v. Danko, 219 Kan. 490, 497-498 (Kan. 1976); United States v. Bacon, 851 F.2d 1312 (11th Cir. 1988).
252. United States v. Wolffs, 594 F.2d 77 (5th Cir. 1979).
253. *Id.* at 85.
254. *Roberts*, 779 F.2d at 565.
255. *Id.* at 568.
256. United States v. Cotten, 471 F.2d 744 (9th Cir. 1973).
257. *Id.* at 749.

years about a potential terrorist attack—likely with chemical or biological weapons. Nevertheless, military officials stubbornly contended that the U.S. military had only the resources to fulfill its traditional duties, much less take on new responsibilities.[258] "The problem is concurrency," said Army Secretary Thomas E. White.[259]

> No one has let us out of our obligations in Kosovo, in Bosnia, in the Sinai, in Korea. The Army is fully deployed in 100 different countries, supporting our regional commanders in chief. And we are hard pressed to do that which the Army is principally organized to do. So we don't need to volunteer for any other tasks.[260]

Resources for these primary missions were so scarce that the Defense Science Board, as part of a summer 2000 study, advised that less than two percent of the defense and intelligence community budget should be devoted to protecting the continental United States against biological, chemical, information, and unconventional military attacks, and for providing civil and counterdrug support.[261] Most of the defense resources delegated to civil authorities were heavily weighted towards managing a terrorist attack with weapons of mass destruction (WMD), and were authorized only if they did not interfere with the military's primary mission of "warfighting."[262]

The September 11, 2001, terrorist attacks dramatically changed the Pentagon's priorities, as well as its place in American society. Within hours of the attacks, the DoD leapt into the role of homeland defense in a very public role. Air Force fighters flew continuous combat air patrols over New York City and Washington D.C., as well as other randomly selected cities or critical infrastructures.[263] In the following months, NORAD intercepted more than 400 civilian

258. Yochi J. Dreazen & David S. Cloud, *Questions of Security: Pentagon, White House Consider New Command Against U.S. Attacks*, WALL ST. J., Nov. 21, 2001, at A8.

259. Bradley Graham, *Pentagon Plans New Command for U.S.; Four Star Officer Would Oversee Homeland Defense*, WASHINGTON POST, Jan. 27, 2002, at A1.

260. *Id.*

261. Steven J. Tomisek, *Homeland Security: The New Role For Defense*, DEFENSE DEPARTMENT: NATIONAL DEFENSE UNIVERSITY 2 (2002).

262. *Id.*

263. *U.S. Fighter Jets Escort Civilian Plane to New York*, REUTERS, July 17 2002 (on file with the WASHINGTON UNIVERSITY JOURNAL OF LAW AND POLICY).

Washington University Open Scholarship

planes.[264] On the ground, over 8,000 National Guard personnel watched over the nation's major transportation hubs, standing guard at 435 airports.[265] Though the Pentagon had previously shown little interest in protecting the nation's "domestic battlespace," between September 11, 2001 and January 23, 2002, the military spent $2.6 billion dollars and mobilized 71,386 soldiers to active duty[266] for that task alone. Army Secretary Thomas White, the Pentagon's top officer on homeland security, summed up the military's new strategy: "Homeland security is the number-one job for the United States military, and it has our full attention."[267]

The military's focus visibly shifted in April 2002, when President George W. Bush approved the revision of the military's command structure.[268] The revision included a new unified component command, the U.S. Northern Command (NORTHCOM). "This command will be responsible for homeland defense and for assisting civil authorities in accordance with U.S. law. . . . The commander of Northern Command will update plans to provide military support to domestic civil authorities in response to natural and man-made disasters and during national emergencies."[269] NORTHCOM was scheduled to begin operation in October 2002, and will cover the continental United States, Canada, Mexico, and areas as far as 500 miles off U.S. shores.[270]

Under budgetary pressure from Congress, the Pentagon had already developed much of its training and doctrine for responding to

---

264. *Id.*

265. Charles Ornstein, *Troops to End Airport Mission; Security: California National Guard Will Close Operations at 28 Facilities by May 10*, LOS ANGELES TIMES, Apr. 22 2002, at B3.

266. Tomisek, *supra* note 261, at 3.

267. Mary Leonard, *Officials Talk of Using Military at Home, Despite Doubts*, BOSTON GLOBE, Oct. 31, 2002 at A10.

268. The U.S. military operates all of its armed services—Army, Navy, Air Force, and Marine Corps—from a single combat command structure that is organized around geographic regions. A single General, known as the Commander-in-Chief, leads each region. Previously, U.S. Joint Forces Command, responsible for the North Atlantic, also oversaw land defense and maritime defense.

269. OFFICE OF HOMELAND SECURITY, NATIONAL STRATEGY FOR HOMELAND SECURITY 44-45 (July 2002), *available at* http://www.whitehouse.gov/homeland/book/ (last visited Feb. 10, 2003).

270. Dena Bunis, *Eberhart Confirmed to Head NorthCom*, COLORADO SPRINGS GAZETTE, June 28, 2002.

a domestic emergency.[271] Much of this was done in anticipation of any future terrorist attack—especially one using WMD, such as chemical, biological, or nuclear agents.[272] By law, the primary authority to prevent and respond to the crime of terrorism is within the Department of Justice, with the Federal Bureau of Investigation ("FBI") as the lead federal operational agency.[273] The FBI, through the Attorney General, may request assistance from the DoD.[274] This aid may come in a variety of forms, such as the loaning of equipment for when a crisis has overwhelmed the FBI's resources and threatens continuity of government.[275]

The DoD's involvement is required by Section 104 of the U.S.A. Patriot Act, which authorizes their use in "case of attack with a weapon of mass destruction."[276] DoD also remains responsible for training civilian "first responders" (fire, police, and emergency medical services) in WMD procedures, as well as maintaining a "domestic terrorism rapid response team" for the immediate support of law enforcement.[277] The Secretary of Defense is the final approving authority for the most sensitive requests, such as for forces that are already assigned to component commanders, the military's response to civil disorder or acts of terrorism, or any involvement that might cause a confrontation or use of lethal force.[278] The Secretary approval authority for all other events, such as natural or manmade disasters, is delegated to the Secretary of the Army. [279]

---

271. *See* Jeffrey D. Brake, *Terrorism and the Military's Role in Domestic Crisis Management: Background Issues for Congress*, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS (April 19, 2001).

272. *Id.*

273. Major Michael Smidt, *Combating Terrorism*, INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S SCHOOL 49-49 (2002), *available at* http://www.au.af.mil/au/awc/awcgate/army/jaoac-ct.pdf (last visited Feb. 10, 2003). However, the Department of Defense is the lead federal agency if a WMD incident involves a military facility or a nuclear weapon in its custody. *See* Chris Quillen, *Posse Comitatus and Nuclear Terrorism*, 32 PARAMETERS: CARLISLE BARRACKS 60 (Spring 2002).

274. Brake, *supra* note 271, at 11-18.

275. *Id.* at 11-13, 16-18.

276. David M. Shribman, *Next in the Debate Over Security At Home, The Role of US Military*, BOSTON GLOBE, July 23, 2002, at A3.

277. Smidt, *supra* note 273, at 49-51.

278. Military Assistance to Civil Authorities, Dep't of Def. Directive 3025.15, at § 4.4, Feb. 18, 1997.

279. Tomisek, *supra* note 261, at 2.

Washington University Open Scholarship

Although the events of September 11, 2001, and the sudden importance of homeland security, have raised the military's profile in civil affairs, there have been proposals in Congress to amend the PCA to provide the military with even more leeway in waging the "war on terrorism." These proposals parallel many of the same arguments that are used to justify the war on drugs. Senator John Warner, the ranking Republican on the Senate Armed Services Committee, proposed the first change. In an October 4, 2002, Congressional hearing, he suggested that "the reasons for the Posse Comitatus Act have long given way to the changed lifestyle we face today here in America."[280] He continued in a letter to Defense Secretary Rumsfeld: "Our way of life has forever changed . . . should this law now be changed to enable our active-duty military to more fully join other domestic assets in this war against terrorism?"[281]

Similarly, President Bush, in his National Strategy for Homeland Security, outlined his intent to at least review the PCA. "The threat of catastrophic terrorism requires a thorough review of the laws permitting the military to act within the United States in order to determine whether domestic preparedness and response efforts would benefit from greater involvement of military personnel and, if so, how."[282] General Ralph E. Eberhart, the Commander of U.S. Northern Command, indicated broad support for at least reviewing the PCA.[283] Other officials, such as Senator Joseph R. Biden, advocate a much more dramatic revision of the law, giving soldiers the power to make arrests.[284]

In contrast, several senior officials in the Bush Administration remain opposed to any suggestion of amending the PCA. The then-Director of the Office of Homeland Defense, Tom Ridge, conceded General Eberhart's suggestion that the PCA should be reviewed, but he opposed any change that would include arrest powers.[285] He later

280. Leonard, *supra* note 267, at 2.
281. *War Prompts Debate on Military Law*, *supra* note 6.
282. OFFICE OF HOMELAND SECURITY, *supra* note 269, at 48.
283. Joyce Howard Price, *Biden Backs Letting Soldiers Arrest Civilians*, WASHINGTON TIMES, July 22, 2002 at 1.
284. *Id.* at 1.
285. *Id.* at 2.

dismissed the possibility of amending the PCA as "very unlikely."[286] Defense Secretary Donald Rumsfeld also opposed the measure, saying that he "has not seen any reasons" why the PCA must be changed.[287]

The degree of the military's involvement will ultimately be decided in either the government's homeland security[288] plan or in the potential changes to posse comitatus. Such changes are uncertain, however, and continue to evolve at both the White House and on Capitol Hill. As of yet, the public has not appeared to notice that this debate could potentially bring change to a fundamental principle of American democracy. Part of this can certainly be attributed to a dissipation of the fear that Americans have historically harbored towards a standing army. The rehabilitation of the military in the public eye over the last 35 years has restored public faith in the motives and ability of the U.S. military. Building from the public scorn and rejection that followed the Vietnam years, the American military delivered dazzling victories in Grenada, Panama, the Gulf, and Afghanistan. A 1997 Gallup poll on the confidence of Americans in social institutions revealed that the U.S. military placed second, ranking behind only small businesses, and above the police, organized religion, and every other branch of the government.[289] Public confidence in the military surged to an impressive seventy-one percent after the 2001 terrorist attacks, but even beforehand it remained strong, registering at fifty-four percent in January 1999 and forty-four percent in January 2001.[290] The public's faith in the military is apparent in a number of ways. Where colonists or

286. *Id.* at 2.

287. Leonard, *supra* note 267, at 3.

288. The National Strategy for Homeland Security's definition of "homeland security" is: "Homeland Security is a concerted national effort to prevent terrorist attacks within the United States, reduce America's vulnerability to terrorism, and minimize the damage and recover from attacks that do occur." *See* OFFICE OF HOMELAND SECURITY, *supra* note 269, at 2. The DoD's working definition of Homeland defense is "the preparation for, prevention of, defense against, and response to threats and aggression directed towards US territory, sovereignty, domestic population, and infrastructure; as well as crisis management, consequence management, and other domestic civil support." Tomisek, *supra* note 261, at 2.

289. Frank Newport, *Americans Most Confident in Small Business and Military*, 70 THE JOURNAL OF STATE GOVERNMENT 9 (Summer 1997).

290. *Major Institutions*, POLLINGREPORT.COM (Aug. 10, 2002), *available at* http://www.polling report.com/institut.htm (last visited Feb. 17, 2003).

Washington University Open Scholarship

confederates would have reviled in the presence of federal troops in previous generations, Los Angelinos during the 1992 Rodney King riots "smiled, waved, and beeped their car horns at passing convoys of soldiers."[291] Soldiers on airport duty during the fall of 2001 reported that passengers bought them coffee or gave them home-baked cookies.[292] Although it is certainly heartening that Americans rally behind their service members, it is clear they are unaware of the dangers that "the founders knew first-hand."[293]

The military would rightfully contest any suggestion that their soldiers would either undermine American values or subvert our democracy. As Defense Secretary Rumsfeld bluntly stated, "[w]e had a lot of troops [supporting the Olympic Games in] Salt Lake City. We did not take over the state. We did not take over the city."[294] No one would contest the honor or patriotism of American soldiers, or suggest that they would deliberately work to undermine our system of government. The military, however, remains the tool of the policymaker, who is often more concerned with ends than means. Meanwhile, the mission, goals, and responsibilities of the federal bureaucratic machine seem to evolve in response to its own needs and priorities. In *Laird v. Tatum*, following President Kennedy's private criticism of the Army for failing to suppress the Mississippi riots, the domestic military surveillance system was challenged not out of a "mischievous desire to violate privacy or liberties of Americans," but because of "the bureaucratic reflex not to be caught short again."[295]

Considerable differences exist between a soldier and peace officer. Soldiers are trained to fight and kill, without concern for the rights of the individual or for constitutional protections against illegal searches, seizures, or arrests. The military's rules of engagement

---

291. Schlichter, *supra* note 189, at 1296.

292. Master Sgt. Bob Haskell, *National Guard Steps in to Help With Airport Security*, DEFENSELINK: U.S. DEPARTMENT OF DEFENSE (Oct. 8, 2001), *available at* http://www.defenselink. mil/news/Oct2001/n10082001_200110083.html (last visited Feb. 17, 2003).

293. Schlichter, *supra* note 189, at 1332.

294. Harry Levins, *Loopholes in Law Give Military Ability to Play Role in U.S.*, ST. LOUIS POST-DISPATCH, Apr. 21, 2002, at B6.

295. Joseph A. Califano, Jr., *Too Many Federal Cops*, WASHINGTON POST, Dec. 6, 2001, at A39.

carry no due process, no consideration of civil right, and smack of an underlying presumption of guilt.[296] The Eighth Circuit Court of Appeals, in *Bissonette v. Haig*,[297] expounded on the inherent risks of employing the military in law enforcement:

> Civilian rule is basic to our system of government. The use of military forces to seize civilians can expose civilian government to the threat of military rule and the suspension of constitutional liberties. On a lesser scale, military enforcement of the civil law leaves the protection of vital fourth and Fifth Amendment rights in the hands of persons who are not trained to uphold these rights. It may also chill the exercise of fundamental rights, such as the rights to speak freely and to vote, and create the atmosphere of fear and hostility which exists in territories occupied by enemy forces.[298]

No matter how well the loosening of military restrictions are received by the public, the abuse of civil liberties seems to always follow. In 1863, the Army quelled draft riots in New York, while a violent military suppression of the 1877 railroad strike resulted in 100 killed, and several hundred wounded.[299] In the 1894 Pullman strike, the President ordered in federal troops over the opposition of the Governor of Illinois,[300] while the Army detained some of the demonstrators in the 1899 miner's strike at Couer d'Alene, Idaho, without charging them with a crime.[301] During World War I, the military broke up labor protests and spied on Union leaders, "substantially slow[ing] unionization for a decade."[302]

These incidents—only a select few out of scores in American history—demonstrate how badly civilian authority can abuse the military to the detriment of the citizens' rights. A string of incidents in recent years is indicative that the military—no matter how

296. John P. Coffey, *The Navy's Role in Interdicting Narcotics Traffic: War on Drugs or Ambush on the Constitution?*, 75 GEO. L.J. 1947, 1959 (1987).

297. Bissonette v. Haig, 776 F.2d 1384 (8th Cir. 1985).

298. *Id.* at 1387.

299. Whelan, *supra* note 99, at 275.

300. AMERICAN MILITARY HISTORY, *supra* note 38, at 286.

301. David B. Kopel & Paul M. Blackman, *Can Soldiers Be Peace Officers? The Waco Disaster and the Militarization of Law Enforcement*, 30 AKRON L. REV 619, 622 (1997).

302. *Id.*

Washington University Open Scholarship

respected in the eyes of the public—still holds potential for abuse. The shooting death of Esequiel Hernandez, a Mexican goat-herder, at the hands of inadequately trained Marine Corps,[303] demonstrates the risks of employing infantry in law enforcement roles.

An analysis of the national strategy for Homeland Defense's definition of terrorism reveals an equal potential for abuse: "Any premeditated, unlawful act dangerous to human life or public welfare that is intended to intimidate or coerce civilian populations or governments."[304] Furthermore, it is frightening to imply that any domestic crime with an underlying political motive, "intended to coerce governments," will equate with an act of terrorism and thus be subject to military intervention. Such involvement is only one step removed from Justice Douglas's dire warning in *Laird v. Tatum*: "Whenever you conclude that it is right to use the Army to execute civil process . . . it is no longer a government founded upon the consent of the people; it has become a government of force."[305]

V. CONCLUSION

> Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety.[306]

Posse comitatus, as a bar against the military's enforcement of civil law, stretches back to the roots of American jurisprudence in English common law. After suffering decades of abuse and injustice at the hands of the Tudor and Stuart monarchs, the English knew very well of the consequences resulting from an unrestrained military presence in domestic affairs. Although this knowledge was impressed upon the psyche of our own nation as a result of similar tactics employed by British occupation forces, the principle has undergone a steady decline. The United States has slowly shifted away from

303. John Flock, *The Legality of United States Military Operations Along the United States-Mexico Border*, 5 S.W. J. OF L. & TRADE AM. 453, 454 (1998).

304. OFFICE OF HOMELAND SECURITY, *supra* note 269, at 2.

305. Flock, *supra* note 303, at 469 (quoting Laird v. Tatum, 408 U.S. 1, 16-40 (1972) (Douglas, J., dissenting)).

306. *Domestic Law Enforcement is Not a Job for the Military*, ATLANTA JOURNAL AND CONSTITUTION, July 19, 2002 (quoting Benjamin Franklin), *available at* http://www.accessatlanta.com/ajc/opinion/0702/19homeland.html (last visited Feb. 17, 2003).

Homeland Defense: Another Nail in the Coffin for *Posse Comitatus*

Nathan Canestaro*

I. INTRODUCTION

> Whoever, except in cases under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined [under this title] or imprisoned not more than two years, or both.[1]

Since its enactment in 1878, the Posse Comitatus Act ("PCA") has upheld a basic value of American democracy—the principle that the military cannot enforce civilian law. This principle, derived from a long tradition of antimilitarism in English common law, represents the "traditional and strong resistance of Americans to any military intrusion into civilian affairs."[2] Despite its status as a "fundamental tenet of our system of law,"[3] the PCA has lain in obscurity for much of its existence. Derided by one court as an "obscure and all-but-forgotten statute,"[4] and "backwash of the Reconstruction period,"[5] its criminal sanctions have never been enforced during its 120-year history. In the limited number of cases where the PCA has undergone judicial review, it has often appeared in defense attorneys' creative—

---

* Counterterrorist Center, Central Intelligence Agency (CIA), 2002. Previously assigned to CIA's Afghanistan Task Force and DCI Interagency Balkan Task Force. J.D., University of Tennessee, 2001.

This material has been reviewed by CIA. That review neither constitutes CIA authentication of information nor implies its endorsement of the author's views.

1. 18 U.S.C. § 1385 (1982).
2. Laird v. Tatum, 408 U.S. 1, 15 (1972).
3. People v. Burden, 288 N.W.2d 392, 397 (Mich. Ct. App. 1979).
4. Chandler v. United States, 171 F.2d 921, 936 (1st Cir. 1948).
5. *Id.*

Washington University Open Scholarship

and almost entirely unsuccessful—motions to contest the prosecution's jurisdiction, to suppress evidence, or to invalidate government action.

The effectiveness of the PCA has declined over the course of the last thirty years. Legislative pressure, a lack of judicial enforcement, and numerous exceptions have taken their toll on the PCA's strength. An increased public confidence in the military and judicial deference to military actions have undermined the principles upon which the PCA was founded. Accordingly, this has increased the Department of Defense's ("DoD") legal freedom to domestically intervene. In the wake of the September 11, 2001, terrorist attacks, the military's place in homeland security has become a major national issue. Even before the attacks, the DoD played a major supporting role in counter-drug efforts and in formulating a response to potential chemical or biological terrorist attacks. Since the attacks, the military has dramatically widened the scope of its domestic activities. For the first time, combat aircraft patrolled the skies over major American cities while uniformed troops stood guard in the nation's airports. The troops and jets have now been withdrawn. Yet the creation of a new military command for the sole purpose of homeland defense indicates the intention of the armed forces to remain engaged in that role.

With the groundswell of public support for the war against terrorism, the decay of posse comitatus has accelerated dramatically. Some politicians and media sources now suggest that Congress amend or even repeal the PCA to allow a degree of domestic military involvement that would have been unthinkable five years ago.[6] Although there is undoubtedly a certain pragmatism in levying the immense resources of the U.S. military against the threat of domestic terrorism, this strategy ignores the consequences of using soldiers as a substitute for civilian law enforcement. The military is not a police force; it is trained to engage and destroy the enemy, not to protect constitutional rights. The founding fathers feared the involvement of the Army in the nation's affairs for good reason. History has demonstrated that employing soldiers to enforce the law is inherently dangerous to the rights of the people.

---

6. *See War Prompts Debate on Military Law: Posse Comitatus Act of 1878 Bans Use of Troops for Many Actions on U.S. Soil*, HOUSTON CHRONICLE, Nov. 11, 2001, at 39.

factors of the *McArthur* test.[215] In *Yunis*, the district court relied on *McArthur*'s "regulatory, proscriptive, or compulsory" standard, holding that "a power regulatory . . . controls or directs, . . . a power proscriptive in nature . . . prohibits or condemns, . . . and a power compulsory in nature exerts some coercive force."[216]

The contradictory decisions in *Red Feather*, *Jamarillo*, and *McArthur* threw the understanding of the PCA into disarray. Specifically, issues arose among both the military and civil authorities as to what comprised an actual violation of the PCA and to what degree the military can assist civil authorities. Although the government successfully defeated in the posse comitatus defense in both *Red Feather* and *McArthur*, the substantial differences in the three decisions cast doubt onto the boundaries of PCA violations.

The 1981 amendments to the PCA were intended to resolve much of this confusion. To pave the way for a DoD role in the "war on drugs," Congress established clear legislative guidance on what sort of assistance was permissible. Congress adopted *Red Feather*'s "active versus passive" standard, allowing the government considerable freedom to provide military assistance to local authorities.[217] By defining the prohibited "active" measures, such as search, seizure, and arrest, the first three sections of the 1981 amendments clearly favored the *Red Feather* holding. These provisions allowed the DoD to provide many of the same sorts of passive aid that had been challenged in the Wounded Knee cases: providing equipment, supplies, technical assistance, intelligence, and training.

The DOD's directives, issued subsequent to the PCA's amendments, were also in line with the Wounded Knee decisions. These decisions adopted the *McArthur* test as a supplemental standard for determining an improper level of military assistance. By establishing that the Navy or Marine Corps are potentially exempt from the PCA, the directives require the Secretary of Defense's approval before either service engages in the "interdiction of a vessel or aircraft, a law enforcement search or seizure, an arrest,

215. United States v. Yunis, 681 F. Supp. 891 (D.C. Cir. 1988).
216. *Id.* at 895-96.
217. United States v. Red Feather, 392 F. Supp. 916, 924-25 (D.S.D. 1975).

Washington University Open Scholarship

apprehension, or other activity that is likely to subject civilians to the use of military power that is regulatory, prescriptive or compulsory."[218]

D. Pushing the Boundaries of the PCA: Defining PCA Violations and Applying an Exclusionary Rule

Over the years, defense attorneys have pressed courts to strengthen the PCA by adopting an exclusionary rule for evidence obtained by military personnel who are acting in violation of its terms. The courts have been very reluctant to broaden the powers of the PCA beyond its strict interpretation as a criminal statute. Relying heavily on a narrow view of both the statutory language and the legislative record, the courts have almost unanimously avoided the question by not finding a PCA violation. More interestingly, they have also refused to enforce an exclusionary rule, even in the face of clear violations. The judiciary's resistance to broadening the PCA's protections is significant, because it demonstrates the courts' continuing deference to military activity and unwillingness to counterbalance the increasing exceptions to the PCA with substantial evidentiary power.

Historically, many PCA-related cases arose from the "best of intentions." These include the base commanders' efforts to help their civilian counterparts in criminal investigations or in military asset loans to pursue and capture escaped convicts.[219] One scholar describes the historical trend as the military's "understandable temptation to help the local authorities, born of morality and the desire for good public relations."[220] The author notes that such "temptation may lead to subterfuge,"[221] when military personnel who are eager to help invent excuses to intervene in violation of beyond the PCA mandates.

In the 1981 PCA amendments, Congress explicitly encouraged the military to perform training exercises for assisting law enforcement,

218. DODD, *supra* note 125, at § E4.3.2.
219. Meeks, *supra* note 78, at 110.
220. Furman, *supra* note 9, at 118.
221. *Id.* at 118.

but only as "an incidental aspect of training performed for a military purpose."[222] For example, the congressional record suggests that "the scheduling of routine training missions can easily accommodate the need for improved intelligence information covering drug trafficking in the Caribbean."[223] This instruction provides a considerable opportunity for the military to circumvent the PCA. In effect, holding riot control training in an area beset by civil disorder,[224] or conducting infantry field exercises in a forest where a convict is on the run,[225] stretches the PCA to its breaking point. Major Furman condemns such trickery "as violative of both the letter and the spirit of the law."[226] Department of the Navy regulations sternly warn that ostensibly military-directed activities should not be used as a "subterfuge" to provide covert assistance.[227]

As a result of these ambiguities, judicial analysis of military assistance to civilians has often turned on either the military purpose doctrine or the degree of military personnel involvement. Under the military purpose doctrine, military action that enforces civil law is legitimate when its primary purpose will either further a military function or enforce the Uniform Code of Military Justice, "regardless of the incidental benefits to civilian authorities."[228] This includes military law enforcement cases where there is reasonable ground to believe that a crime is related to military personnel, or when a civilian commits a crime that affects a military installation.[229]

A series of cases have upheld the validity of military investigations on the basis of the military purpose doctrine.[230] In

---

222. Col. Paul Jackson Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 104 MIL. L. REV. 109, 114 (1984) (quoting DODD 5525.5, Encl. 2, para. A.5 (Mar. 22, 1982)).

223. *Id.* at 114 (quoting H.R. Rep. No. 87-71, at 8).

224. *Id.* at 121.

225. Furman, *supra* note 9, at 118-19.

226. *Id.* at 119.

227. SECNAVINST, *supra* note 127, at 4.

228. DODD, *supra* note 125, at § E4.1.2.1. *See also* Furman, *supra* note 9, at 112-26; Rice, *supra* note 222, at 128; Meeks, *supra* note 78, at 124-26.

229. Jonathan W. Hitesman, *Fighting in Another Direction: The Posse Comitatus Act and the War on Drugs in Hawai'i Under State v. Pattioay,* 18 U. HAW. L. REV 835, 843 (1996).

230. *See* United States v. Hartley, 486 F. Supp 1348 (D. Fla. 1980); United States v. Bacon, 851 F.2d 1312 (11th Cir. 1988); United States v. Hartley, 796 F.2d 112 (5th Cir. 1986). *See also* United States v. Chon, 210 F.3d 990 (9th Cir. 2000); United States v. Thompson, 33 M.J. 218, 221 (C.M.A. 1991); United States v. Hitchcock, 286 F.3d 1064 (9th Cir. 2002); Applewhite v.

Washington University Open Scholarship

United States v. Hartley, the defendants were under contract to sell shrimp to the DoD.[231] A military investigation revealed that the defendants tampered with samples of their products in order to conceal the fact that their goods were substandard. The defendants claimed that the indictment should be dismissed because the Air Force investigators were operating in violation of the PCA.[232] The court denied the defendants' motion, holding that the investigation "involved military personnel . . . performing functions they would normally perform in the course of their duties."[233]

The Eleventh Circuit used a similar line of reasoning in *United States v. Bacon*.[234] In *Bacon*, the military's investigative service, the Criminal Investigation Division ("CID"), and the Georgia Bureau of Investigation, conducted a joint investigation that culminated when an undercover military investigator made a covert purchase from the defendant. Considering the military's level of involvement in the investigation, the *Bacon* court ruled that there was no violation of the PCA.[235] The military investigator assisted his civilian counterparts "only to the extent of activities normally performed in the ordinary course of his duties,"[236] with no evident "military permeation of civilian law enforcement."[237]

In finding PCA violations, the courts also considered the breadth of participation by military personnel in their law enforcement duties.[238] Under this standard, a violation during the military's investigation is potentially indicated by the arrest of civilians, soldiers drawing their weapons in the course of their investigation, and the search, seizure, or administrative handling of suspects and evidence during arrest.[239] In *United States v. Yunis*,[240] the defendant, a

---

United States Air Force, 995 F.2d 997 (10th Cir. 1993).

231. United States v. Hartley, 486 F. Supp. 1348 (1980).

232. *Hartley*, 486 F. Supp. at 1357.

233. *Id.*

234. *Bacon*, 851 F.2d 1312.

235. *Id.*

236. *Bacon*, 851 F.2d at 1313-14.

237. *Id.* at 1314.

238. *See* North Carolina v. Trueblood, 265 S.E.2d 662 (N.C. Ct. App. 1980); *see also* United States v. al-Talib, 55 F.3d 923, 930 (4th Cir. 1995); Burns v. Texas, 473 S.W.2d 19 (Tex. Crim. App. 1971).

239. Hitesman, *supra* note 229, at 857.

240. United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991). *Accord* United States v.

Lebanese hijacker, argued that the FBI committed a posse comitatus violation after it captured him overseas and transferred him to Navy custody for transport back to the United States. The court dismissed his argument, rehashing the Wounded Knee decisions to find that the Navy may only provide indirect assistance when it does not constitute "the exercise of regulatory, proscriptive, or compulsory power."[241] Further, the court held that such action does not "amount to direct active involvement in the execution of the laws,"[242] or "pervade the activities of civilian authorities."[243] In *North Carolina v. Trueblood*, the state court of appeals found no PCA violation where an Army criminal investigations officer rode as a passenger in a police car, wore no uniform, carried no weapon, and merely provided the police officer with the name and address of the suspect, an officer in the Army.[244]

Even when the courts have found a violation of the PCA, they have still been surprisingly reluctant to enforce an exclusionary rule. The PCA does not provide that evidence gathered in violation of its terms is inadmissible. However, the congressional record indicates that the PCA was intended solely as a punitive measure against soldiers or civilians who would use the military to enforce a political agenda. The leading precedent in this line of cases, *United States v. Walden*,[245] noted that "[the PCA] expresses a policy that is for the benefit of the people as a whole, but not one that may be fairly characterized as expressly designed to protect the personal rights" of individual citizens.[246] Similarly, in *State v. Pattioay*,[247] the Hawaiian Supreme Court ruled that the PCA is not "analogous" to constitutional rights. The court stated that the evidence must be suppressed when such rights are violated, as the PCA creates no such freedom for military investigations.[248]

Khan, 35 F.3d 426 (9th Cir. 1994).

241. *Yunis*, 924 F.2d at 1094.
242. *Id.* at 1094.
243. *Id.* at 1094.
244. *Trueblood*, 46 N.C. App. at 543.
245. United States v. Walden, 490 F.2d 372 (4th Cir. 1974).
246. *Id.* at 377 n.11.
247. State v. Pattioay, 896 P.2d 911 (Haw. 1995).
248. *Id.* at 922.

Washington University Open Scholarship

In *Walden*, the Fourth Circuit opted not to impose the "extraordinary remedy"[249] of an exclusionary rule. Relying on both the relative obscurity of the rule and the limited number of reported violations, the court concluded that "[s]hould there be evidence of widespread or repeated violations . . . we will . . . consider whether adoption of an exclusionary rule is required as a future deterrent."[250] Most courts have followed *Walden*'s lead.[251] In *United States v. Wolffs*,[252] the Fifth Circuit deferred from resolving the case on PCA grounds. Instead, the court held that even if the involvement of a CID investigator who is acting as an informant for local law enforcement would violate the PCA, it would still refrain from applying the exclusionary rule. The court stated unequivocally that only if they were "confronted in the future with widespread and repeated violations of the Posse Comitatus Act, . . . [would] . . . an exclusionary rule . . . be fashioned at that time."[253] The court in *United States v. Roberts*[254] came to a similar holding, observing that the courts have "uniformly refused to apply the exclusionary rule to evidence seized in violation of the Posse Comitatus Act."[255] In *United States v. Cotton*,[256] the Ninth Circuit denied the application of the exclusionary rule by simply stating that "the remedy requested exceeds that required by the conduct."[257]

IV. HOMELAND DEFENSE: ENDS JUSTIFYING MEANS

Homeland defense and domestic security was not a priority for the U.S. military before the September 11, 2001, terrorist attacks. Many senior officials in the intelligence community and the Bush and Clinton Administrations had been warning the military for several

249. *Walden*, 490 F.2d at 373.
250. *Id.* at 377.
251. Hitesman, *supra* note 229, at 858 n.162. *See* United States v. Roberts, 779 F.2d 565, 568 (9th Cir. 1986). *See also* United States v. Mendoza-Cecelia, 963 F.2d 1467, 1478 (11th Cir. 1992); United States v. Rasheed, 802 F. Supp. 312, 324 (D. Haw. 1992); State v. Danko, 219 Kan. 490, 497-498 (Kan. 1976); United States v. Bacon, 851 F.2d 1312 (11th Cir. 1988).
252. United States v. Wolffs, 594 F.2d 77 (5th Cir. 1979).
253. *Id.* at 85.
254. *Roberts*, 779 F.2d at 565.
255. *Id.* at 568.
256. United States v. Cotten, 471 F.2d 744 (9th Cir. 1973).
257. *Id.* at 749.

years about a potential terrorist attack—likely with chemical or biological weapons. Nevertheless, military officials stubbornly contended that the U.S. military had only the resources to fulfill its traditional duties, much less take on new responsibilities.[258] "The problem is concurrency," said Army Secretary Thomas E. White.[259]

> No one has let us out of our obligations in Kosovo, in Bosnia, in the Sinai, in Korea. The Army is fully deployed in 100 different countries, supporting our regional commanders in chief. And we are hard pressed to do that which the Army is principally organized to do. So we don't need to volunteer for any other tasks.[260]

Resources for these primary missions were so scarce that the Defense Science Board, as part of a summer 2000 study, advised that less than two percent of the defense and intelligence community budget should be devoted to protecting the continental United States against biological, chemical, information, and unconventional military attacks, and for providing civil and counterdrug support.[261] Most of the defense resources delegated to civil authorities were heavily weighted towards managing a terrorist attack with weapons of mass destruction (WMD), and were authorized only if they did not interfere with the military's primary mission of "warfighting."[262]

The September 11, 2001, terrorist attacks dramatically changed the Pentagon's priorities, as well as its place in American society. Within hours of the attacks, the DoD leapt into the role of homeland defense in a very public role. Air Force fighters flew continuous combat air patrols over New York City and Washington D.C., as well as other randomly selected cities or critical infrastructures.[263] In the following months, NORAD intercepted more than 400 civilian

258. Yochi J. Dreazen & David S. Cloud, *Questions of Security: Pentagon, White House Consider New Command Against U.S. Attacks*, WALL ST. J., Nov. 21, 2001, at A8.

259. Bradley Graham, *Pentagon Plans New Command for U.S.; Four Star Officer Would Oversee Homeland Defense*, WASHINGTON POST, Jan. 27, 2002, at A1.

260. *Id.*

261. Steven J. Tomisek, *Homeland Security: The New Role For Defense*, DEFENSE DEPARTMENT: NATIONAL DEFENSE UNIVERSITY 2 (2002).

262. *Id.*

263. *U.S. Fighter Jets Escort Civilian Plane to New York*, REUTERS, July 17 2002 (on file with the WASHINGTON UNIVERSITY JOURNAL OF LAW AND POLICY).

Washington University Open Scholarship

planes.[264] On the ground, over 8,000 National Guard personnel watched over the nation's major transportation hubs, standing guard at 435 airports.[265] Though the Pentagon had previously shown little interest in protecting the nation's "domestic battlespace," between September 11, 2001 and January 23, 2002, the military spent $2.6 billion dollars and mobilized 71,386 soldiers to active duty[266] for that task alone. Army Secretary Thomas White, the Pentagon's top officer on homeland security, summed up the military's new strategy: "Homeland security is the number-one job for the United States military, and it has our full attention."[267]

The military's focus visibly shifted in April 2002, when President George W. Bush approved the revision of the military's command structure.[268] The revision included a new unified component command, the U.S. Northern Command (NORTHCOM). "This command will be responsible for homeland defense and for assisting civil authorities in accordance with U.S. law. . . . The commander of Northern Command will update plans to provide military support to domestic civil authorities in response to natural and man-made disasters and during national emergencies."[269] NORTHCOM was scheduled to begin operation in October 2002, and will cover the continental United States, Canada, Mexico, and areas as far as 500 miles off U.S. shores.[270]

Under budgetary pressure from Congress, the Pentagon had already developed much of its training and doctrine for responding to

---

264. *Id.*

265. Charles Ornstein, *Troops to End Airport Mission; Security: California National Guard Will Close Operations at 28 Facilities by May 10*, LOS ANGELES TIMES, Apr. 22 2002, at B3.

266. Tomisek, *supra* note 261, at 3.

267. Mary Leonard, *Officials Talk of Using Military at Home, Despite Doubts*, BOSTON GLOBE, Oct. 31, 2002 at A10.

268. The U.S. military operates all of its armed services—Army, Navy, Air Force, and Marine Corps—from a single combat command structure that is organized around geographic regions. A single General, known as the Commander-in-Chief, leads each region. Previously, U.S. Joint Forces Command, responsible for the North Atlantic, also oversaw land defense and maritime defense.

269. OFFICE OF HOMELAND SECURITY, NATIONAL STRATEGY FOR HOMELAND SECURITY 44-45 (July 2002), *available at* http://www.whitehouse.gov/homeland/book/ (last visited Feb. 10, 2003).

270. Dena Bunis, *Eberhart Confirmed to Head NorthCom*, COLORADO SPRINGS GAZETTE, June 28, 2002.

a domestic emergency.[271] Much of this was done in anticipation of any future terrorist attack—especially one using WMD, such as chemical, biological, or nuclear agents.[272] By law, the primary authority to prevent and respond to the crime of terrorism is within the Department of Justice, with the Federal Bureau of Investigation ("FBI") as the lead federal operational agency.[273] The FBI, through the Attorney General, may request assistance from the DoD.[274] This aid may come in a variety of forms, such as the loaning of equipment for when a crisis has overwhelmed the FBI's resources and threatens continuity of government.[275]

The DoD's involvement is required by Section 104 of the U.S.A. Patriot Act, which authorizes their use in "case of attack with a weapon of mass destruction."[276] DoD also remains responsible for training civilian "first responders" (fire, police, and emergency medical services) in WMD procedures, as well as maintaining a "domestic terrorism rapid response team" for the immediate support of law enforcement.[277] The Secretary of Defense is the final approving authority for the most sensitive requests, such as for forces that are already assigned to component commanders, the military's response to civil disorder or acts of terrorism, or any involvement that might cause a confrontation or use of lethal force.[278] The Secretary approval authority for all other events, such as natural or manmade disasters, is delegated to the Secretary of the Army. [279]

---

271. *See* Jeffrey D. Brake, *Terrorism and the Military's Role in Domestic Crisis Management: Background Issues for Congress*, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS (April 19, 2001).

272. *Id.*

273. Major Michael Smidt, *Combating Terrorism*, INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S SCHOOL 49-49 (2002), *available at* http://www.au.af.mil/au/awc/awcgate/army/jaoac-ct.pdf (last visited Feb. 10, 2003). However, the Department of Defense is the lead federal agency if a WMD incident involves a military facility or a nuclear weapon in its custody. *See* Chris Quillen, *Posse Comitatus and Nuclear Terrorism*, 32 PARAMETERS: CARLISLE BARRACKS 60 (Spring 2002).

274. Brake, *supra* note 271, at 11-18.

275. *Id.* at 11-13, 16-18.

276. David M. Shribman, *Next in the Debate Over Security At Home, The Role of US Military*, BOSTON GLOBE, July 23, 2002, at A3.

277. Smidt, *supra* note 273, at 49-51.

278. Military Assistance to Civil Authorities, Dep't of Def. Directive 3025.15, at § 4.4, Feb. 18, 1997.

279. Tomisek, *supra* note 261, at 2.

Washington University Open Scholarship

Although the events of September 11, 2001, and the sudden importance of homeland security, have raised the military's profile in civil affairs, there have been proposals in Congress to amend the PCA to provide the military with even more leeway in waging the "war on terrorism." These proposals parallel many of the same arguments that are used to justify the war on drugs. Senator John Warner, the ranking Republican on the Senate Armed Services Committee, proposed the first change. In an October 4, 2002, Congressional hearing, he suggested that "the reasons for the Posse Comitatus Act have long given way to the changed lifestyle we face today here in America."[280] He continued in a letter to Defense Secretary Rumsfeld: "Our way of life has forever changed . . . should this law now be changed to enable our active-duty military to more fully join other domestic assets in this war against terrorism?"[281]

Similarly, President Bush, in his National Strategy for Homeland Security, outlined his intent to at least review the PCA. "The threat of catastrophic terrorism requires a thorough review of the laws permitting the military to act within the United States in order to determine whether domestic preparedness and response efforts would benefit from greater involvement of military personnel and, if so, how."[282] General Ralph E. Eberhart, the Commander of U.S. Northern Command, indicated broad support for at least reviewing the PCA.[283] Other officials, such as Senator Joseph R. Biden, advocate a much more dramatic revision of the law, giving soldiers the power to make arrests.[284]

In contrast, several senior officials in the Bush Administration remain opposed to any suggestion of amending the PCA. The then-Director of the Office of Homeland Defense, Tom Ridge, conceded General Eberhart's suggestion that the PCA should be reviewed, but he opposed any change that would include arrest powers.[285] He later

280. Leonard, *supra* note 267, at 2.
281. *War Prompts Debate on Military Law*, *supra* note 6.
282. OFFICE OF HOMELAND SECURITY, *supra* note 269, at 48.
283. Joyce Howard Price, *Biden Backs Letting Soldiers Arrest Civilians*, WASHINGTON TIMES, July 22, 2002 at 1.
284. *Id.* at 1.
285. *Id.* at 2.

dismissed the possibility of amending the PCA as "very unlikely."[286] Defense Secretary Donald Rumsfeld also opposed the measure, saying that he "has not seen any reasons" why the PCA must be changed.[287]

The degree of the military's involvement will ultimately be decided in either the government's homeland security[288] plan or in the potential changes to posse comitatus. Such changes are uncertain, however, and continue to evolve at both the White House and on Capitol Hill. As of yet, the public has not appeared to notice that this debate could potentially bring change to a fundamental principle of American democracy. Part of this can certainly be attributed to a dissipation of the fear that Americans have historically harbored towards a standing army. The rehabilitation of the military in the public eye over the last 35 years has restored public faith in the motives and ability of the U.S. military. Building from the public scorn and rejection that followed the Vietnam years, the American military delivered dazzling victories in Grenada, Panama, the Gulf, and Afghanistan. A 1997 Gallup poll on the confidence of Americans in social institutions revealed that the U.S. military placed second, ranking behind only small businesses, and above the police, organized religion, and every other branch of the government.[289] Public confidence in the military surged to an impressive seventy-one percent after the 2001 terrorist attacks, but even beforehand it remained strong, registering at fifty-four percent in January 1999 and forty-four percent in January 2001.[290] The public's faith in the military is apparent in a number of ways. Where colonists or

286. *Id.* at 2.

287. Leonard, *supra* note 267, at 3.

288. The National Strategy for Homeland Security's definition of "homeland security" is: "Homeland Security is a concerted national effort to prevent terrorist attacks within the United States, reduce America's vulnerability to terrorism, and minimize the damage and recover from attacks that do occur." *See* OFFICE OF HOMELAND SECURITY, *supra* note 269, at 2. The DoD's working definition of Homeland defense is "the preparation for, prevention of, defense against, and response to threats and aggression directed towards US territory, sovereignty, domestic population, and infrastructure; as well as crisis management, consequence management, and other domestic civil support." Tomisek, *supra* note 261, at 2.

289. Frank Newport, *Americans Most Confident in Small Business and Military*, 70 THE JOURNAL OF STATE GOVERNMENT 9 (Summer 1997).

290. *Major Institutions*, POLLINGREPORT.COM (Aug. 10, 2002), *available at* http://www.polling report.com/institut.htm (last visited Feb. 17, 2003).

Washington University Open Scholarship

confederates would have reviled in the presence of federal troops in previous generations, Los Angelinos during the 1992 Rodney King riots "smiled, waved, and beeped their car horns at passing convoys of soldiers."[291] Soldiers on airport duty during the fall of 2001 reported that passengers bought them coffee or gave them home-baked cookies.[292] Although it is certainly heartening that Americans rally behind their service members, it is clear they are unaware of the dangers that "the founders knew first-hand."[293]

The military would rightfully contest any suggestion that their soldiers would either undermine American values or subvert our democracy. As Defense Secretary Rumsfeld bluntly stated, "[w]e had a lot of troops [supporting the Olympic Games in] Salt Lake City. We did not take over the state. We did not take over the city."[294] No one would contest the honor or patriotism of American soldiers, or suggest that they would deliberately work to undermine our system of government. The military, however, remains the tool of the policymaker, who is often more concerned with ends than means. Meanwhile, the mission, goals, and responsibilities of the federal bureaucratic machine seem to evolve in response to its own needs and priorities. In *Laird v. Tatum*, following President Kennedy's private criticism of the Army for failing to suppress the Mississippi riots, the domestic military surveillance system was challenged not out of a "mischievous desire to violate privacy or liberties of Americans," but because of "the bureaucratic reflex not to be caught short again."[295]

Considerable differences exist between a soldier and peace officer. Soldiers are trained to fight and kill, without concern for the rights of the individual or for constitutional protections against illegal searches, seizures, or arrests. The military's rules of engagement

---

291. Schlichter, *supra* note 189, at 1296.

292. Master Sgt. Bob Haskell, *National Guard Steps in to Help With Airport Security*, DEFENSELINK: U.S. DEPARTMENT OF DEFENSE (Oct. 8, 2001), *available at* http://www.defenselink. mil/news/Oct2001/n10082001_200110083.html (last visited Feb. 17, 2003).

293. Schlichter, *supra* note 189, at 1332.

294. Harry Levins, *Loopholes in Law Give Military Ability to Play Role in U.S.*, ST. LOUIS POST-DISPATCH, Apr. 21, 2002, at B6.

295. Joseph A. Califano, Jr., *Too Many Federal Cops*, WASHINGTON POST, Dec. 6, 2001, at A39.

carry no due process, no consideration of civil right, and smack of an underlying presumption of guilt.[296] The Eighth Circuit Court of Appeals, in *Bissonette v. Haig*,[297] expounded on the inherent risks of employing the military in law enforcement:

> Civilian rule is basic to our system of government. The use of military forces to seize civilians can expose civilian government to the threat of military rule and the suspension of constitutional liberties. On a lesser scale, military enforcement of the civil law leaves the protection of vital fourth and Fifth Amendment rights in the hands of persons who are not trained to uphold these rights. It may also chill the exercise of fundamental rights, such as the rights to speak freely and to vote, and create the atmosphere of fear and hostility which exists in territories occupied by enemy forces.[298]

No matter how well the loosening of military restrictions are received by the public, the abuse of civil liberties seems to always follow. In 1863, the Army quelled draft riots in New York, while a violent military suppression of the 1877 railroad strike resulted in 100 killed, and several hundred wounded.[299] In the 1894 Pullman strike, the President ordered in federal troops over the opposition of the Governor of Illinois,[300] while the Army detained some of the demonstrators in the 1899 miner's strike at Couer d'Alene, Idaho, without charging them with a crime.[301] During World War I, the military broke up labor protests and spied on Union leaders, "substantially slow[ing] unionization for a decade."[302]

These incidents—only a select few out of scores in American history—demonstrate how badly civilian authority can abuse the military to the detriment of the citizens' rights. A string of incidents in recent years is indicative that the military—no matter how

296. John P. Coffey, *The Navy's Role in Interdicting Narcotics Traffic: War on Drugs or Ambush on the Constitution?*, 75 GEO. L.J. 1947, 1959 (1987).

297. Bissonette v. Haig, 776 F.2d 1384 (8th Cir. 1985).

298. *Id.* at 1387.

299. Whelan, *supra* note 99, at 275.

300. AMERICAN MILITARY HISTORY, *supra* note 38, at 286.

301. David B. Kopel & Paul M. Blackman, *Can Soldiers Be Peace Officers? The Waco Disaster and the Militarization of Law Enforcement*, 30 AKRON L. REV 619, 622 (1997).

302. *Id.*

Washington University Open Scholarship

respected in the eyes of the public—still holds potential for abuse. The shooting death of Esequiel Hernandez, a Mexican goat-herder, at the hands of inadequately trained Marine Corps,[303] demonstrates the risks of employing infantry in law enforcement roles.

An analysis of the national strategy for Homeland Defense's definition of terrorism reveals an equal potential for abuse: "Any premeditated, unlawful act dangerous to human life or public welfare that is intended to intimidate or coerce civilian populations or governments."[304] Furthermore, it is frightening to imply that any domestic crime with an underlying political motive, "intended to coerce governments," will equate with an act of terrorism and thus be subject to military intervention. Such involvement is only one step removed from Justice Douglas's dire warning in *Laird v. Tatum*: "Whenever you conclude that it is right to use the Army to execute civil process . . . it is no longer a government founded upon the consent of the people; it has become a government of force."[305]

V. CONCLUSION

> Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety.[306]

Posse comitatus, as a bar against the military's enforcement of civil law, stretches back to the roots of American jurisprudence in English common law. After suffering decades of abuse and injustice at the hands of the Tudor and Stuart monarchs, the English knew very well of the consequences resulting from an unrestrained military presence in domestic affairs. Although this knowledge was impressed upon the psyche of our own nation as a result of similar tactics employed by British occupation forces, the principle has undergone a steady decline. The United States has slowly shifted away from

303. John Flock, *The Legality of United States Military Operations Along the United States-Mexico Border*, 5 S.W. J. OF L. & TRADE AM. 453, 454 (1998).

304. OFFICE OF HOMELAND SECURITY, *supra* note 269, at 2.

305. Flock, *supra* note 303, at 469 (quoting Laird v. Tatum, 408 U.S. 1, 16-40 (1972) (Douglas, J., dissenting)).

306. *Domestic Law Enforcement is Not a Job for the Military*, ATLANTA JOURNAL AND CONSTITUTION, July 19, 2002 (quoting Benjamin Franklin), *available at* http://www.accessatlanta.com/ajc/opinion/0702/19homeland.html (last visited Feb. 17, 2003).

Homeland Defense: Another Nail in the Coffin for *Posse Comitatus*

Nathan Canestaro*

I. INTRODUCTION

> Whoever, except in cases under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined [under this title] or imprisoned not more than two years, or both.[1]

Since its enactment in 1878, the Posse Comitatus Act ("PCA") has upheld a basic value of American democracy—the principle that the military cannot enforce civilian law. This principle, derived from a long tradition of antimilitarism in English common law, represents the "traditional and strong resistance of Americans to any military intrusion into civilian affairs."[2] Despite its status as a "fundamental tenet of our system of law,"[3] the PCA has lain in obscurity for much of its existence. Derided by one court as an "obscure and all-but-forgotten statute,"[4] and "backwash of the Reconstruction period,"[5] its criminal sanctions have never been enforced during its 120-year history. In the limited number of cases where the PCA has undergone judicial review, it has often appeared in defense attorneys' creative—

---

* Counterterrorist Center, Central Intelligence Agency (CIA), 2002. Previously assigned to CIA's Afghanistan Task Force and DCI Interagency Balkan Task Force. J.D., University of Tennessee, 2001.

This material has been reviewed by CIA. That review neither constitutes CIA authentication of information nor implies its endorsement of the author's views.

1. 18 U.S.C. § 1385 (1982).
2. Laird v. Tatum, 408 U.S. 1, 15 (1972).
3. People v. Burden, 288 N.W.2d 392, 397 (Mich. Ct. App. 1979).
4. Chandler v. United States, 171 F.2d 921, 936 (1st Cir. 1948).
5. *Id.*

Washington University Open Scholarship

and almost entirely unsuccessful—motions to contest the prosecution's jurisdiction, to suppress evidence, or to invalidate government action.

The effectiveness of the PCA has declined over the course of the last thirty years. Legislative pressure, a lack of judicial enforcement, and numerous exceptions have taken their toll on the PCA's strength. An increased public confidence in the military and judicial deference to military actions have undermined the principles upon which the PCA was founded. Accordingly, this has increased the Department of Defense's ("DoD") legal freedom to domestically intervene. In the wake of the September 11, 2001, terrorist attacks, the military's place in homeland security has become a major national issue. Even before the attacks, the DoD played a major supporting role in counter-drug efforts and in formulating a response to potential chemical or biological terrorist attacks. Since the attacks, the military has dramatically widened the scope of its domestic activities. For the first time, combat aircraft patrolled the skies over major American cities while uniformed troops stood guard in the nation's airports. The troops and jets have now been withdrawn. Yet the creation of a new military command for the sole purpose of homeland defense indicates the intention of the armed forces to remain engaged in that role.

With the groundswell of public support for the war against terrorism, the decay of posse comitatus has accelerated dramatically. Some politicians and media sources now suggest that Congress amend or even repeal the PCA to allow a degree of domestic military involvement that would have been unthinkable five years ago.[6] Although there is undoubtedly a certain pragmatism in levying the immense resources of the U.S. military against the threat of domestic terrorism, this strategy ignores the consequences of using soldiers as a substitute for civilian law enforcement. The military is not a police force; it is trained to engage and destroy the enemy, not to protect constitutional rights. The founding fathers feared the involvement of the Army in the nation's affairs for good reason. History has demonstrated that employing soldiers to enforce the law is inherently dangerous to the rights of the people.

---

6. *See War Prompts Debate on Military Law: Posse Comitatus Act of 1878 Bans Use of Troops for Many Actions on U.S. Soil*, HOUSTON CHRONICLE, Nov. 11, 2001, at 39.

This Article will prove that the "War on Terrorism" will undermine the PCA. The "War on Drugs" has already eroded the PCA, but the "War on Terrorism" could be fatal to it. First, this Article will examine the roots of the principle of posse comitatus in English Common Law, and in the context of Colonial America and the post-Reconstruction period. This Article will establish that a separation of the civil and military spheres, specifically by prohibiting the military's enforcement of civil law, is a fundamental value upon which the United States was founded. It will show how this prohibition has been slowly eroding since early in this nation's history. Focusing on the civil abuses of posse comitatus during the Reconstruction period will demonstrate the consequences of unchecked domestic military power.

Next, this Article will turn to the 1981 and 1988 Drug War amendments to the PCA to show that Congress has demonstrated its intent to levy the military's resources against society's problems, even over the DoD's objections to extend their duties beyond their role as the nation's "warfighter." This Article will then examine each of the exceptions to the PCA to prove that substantial exceptions have seriously weakened it. Building on narrow judicial interpretations of the PCA, Congress has responded to modern national security threats such as drugs, terrorism, and weapons of mass destruction by giving the military a substantial support role. Beginning with the Wounded Knee standoff of 1973, the amount of military assistance that the PCA permits has risen dramatically. Meanwhile, the courts have been extremely reluctant to enforce violations to expand its scope beyond criminal sanctions. Finally, this Article will analyze the military's growing role in homeland defense, and explore the consequences of the decline of posse comitatus.

II. HISTORICAL ORIGINS OF POSSE COMITATUS

A. English Common Law

> A Standing Army, however necessary it may be at some times, is always dangerous to the Liberties of the People. Soldiers are apt to consider themselves as a Body distinct from the rest of the Citizens. They have their Arms always in their hands . . .

Washington University Open Scholarship

showing restraint in the domestic use of the military's forces, and is now moving towards a more pragmatic approach that relies on the military's vast resources as a means of law enforcement.

Posse comitatus found legislative expression in response to military rule over the South during Reconstruction. Since then, however, legislative exceptions, a lack of judicial enforcement, blurring of the distinction between militia and regular military forces, and increased public confidence in the military have all taken their toll on the strength of the PCA. In recent years, this decline has become much more rapid. Congress responded to the increasing variety and sophistication of threats to national security by legislating—over the military's objections—a quickly expanding role for them in emergency response, in WMD management, and in the War on Drugs.

The PCA now contains substantial exceptions to allow military action. Narrowly-drafted restrictions on the forces and services included in the scope of the PCA allow some arms of the military a significant degree of freedom. The PCA permits indirect support measures—such as training, advising, and the loaning and operation of equipment—for all of the armed services. The judiciary, demonstrating their traditional deference to military activity, has undermined efforts to broaden the prohibitions of the PCA by including an exclusionary power.

It now seems apparent that the federal government believes that it needs a wide degree of military intervention in order to protect the United States from continuing terrorist attacks. Taking to heart Alexander Hamilton's warning about "fettering the government with restrictions that cannot be observed,"[307] the military seems ready to take on a vast role in counter-terrorism. Congress is considering amending the law yet again to allow the Department of Defense even more freedom to intervene. With the tremendous support for military action and the overwhelming public demand for better homeland security, continued modification—either by legislation or by practice—will erode the PCA to the point where the exceptions swallow the rule.

---

307. THE FEDERALIST NO. 25 (Alexander Hamilton).

Whether these changes are even needed—or effective—to prevent terrorism is a subject of debate. One thing is certain, however. If posse comitatus becomes a victim of the war against terrorism, civil liberties will suffer as a result. History has demonstrated time and again that the military is no substitute for law enforcement. Military personnel are not trained to protect constitutional rights in their pursuit of justice, nor do they practice the proper criminal procedure required by our courts. As Justice Douglas stated, "[T]he civil administration is the product of political processes rooted in the traditions of civil liberties and the rights of man. The military regime has a different expertise—that of war and combat. The civil administration brings to its task all of the great traditions embodied in the Bill of Rights. The military knows only short-cuts and substitutes."[308]

It seems our nation long ago began descending the slippery slope of domestic military intervention. Recent events have presented us with a final opportunity to stay our decline. Whether our government will chose to do so is not yet clear. The costs of continuing onward certainly are.

---

308. DOUGLAS, *supra* note 10, at 42.

Washington University Open Scholarship

showing restraint in the domestic use of the military's forces, and is now moving towards a more pragmatic approach that relies on the military's vast resources as a means of law enforcement.

Posse comitatus found legislative expression in response to military rule over the South during Reconstruction. Since then, however, legislative exceptions, a lack of judicial enforcement, blurring of the distinction between militia and regular military forces, and increased public confidence in the military have all taken their toll on the strength of the PCA. In recent years, this decline has become much more rapid. Congress responded to the increasing variety and sophistication of threats to national security by legislating—over the military's objections—a quickly expanding role for them in emergency response, in WMD management, and in the War on Drugs.

The PCA now contains substantial exceptions to allow military action. Narrowly-drafted restrictions on the forces and services included in the scope of the PCA allow some arms of the military a significant degree of freedom. The PCA permits indirect support measures—such as training, advising, and the loaning and operation of equipment—for all of the armed services. The judiciary, demonstrating their traditional deference to military activity, has undermined efforts to broaden the prohibitions of the PCA by including an exclusionary power.

It now seems apparent that the federal government believes that it needs a wide degree of military intervention in order to protect the United States from continuing terrorist attacks. Taking to heart Alexander Hamilton's warning about "fettering the government with restrictions that cannot be observed,"[307] the military seems ready to take on a vast role in counter-terrorism. Congress is considering amending the law yet again to allow the Department of Defense even more freedom to intervene. With the tremendous support for military action and the overwhelming public demand for better homeland security, continued modification—either by legislation or by practice—will erode the PCA to the point where the exceptions swallow the rule.

---

307. THE FEDERALIST NO. 25 (Alexander Hamilton).

Whether these changes are even needed—or effective—to prevent terrorism is a subject of debate. One thing is certain, however. If posse comitatus becomes a victim of the war against terrorism, civil liberties will suffer as a result. History has demonstrated time and again that the military is no substitute for law enforcement. Military personnel are not trained to protect constitutional rights in their pursuit of justice, nor do they practice the proper criminal procedure required by our courts. As Justice Douglas stated, "[T]he civil administration is the product of political processes rooted in the traditions of civil liberties and the rights of man. The military regime has a different expertise—that of war and combat. The civil administration brings to its task all of the great traditions embodied in the Bill of Rights. The military knows only short-cuts and substitutes."[308]

It seems our nation long ago began descending the slippery slope of domestic military intervention. Recent events have presented us with a final opportunity to stay our decline. Whether our government will chose to do so is not yet clear. The costs of continuing onward certainly are.

---

308. DOUGLAS, *supra* note 10, at 42.

Washington University Open Scholarship